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Supreme Court, U. S.
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No. 16 Original

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR JUDGMENT

INDEX

	Page
Jurisdiction	1
Questions presented	1
Statement	2
Summary of Argument	7
Argument:	
I. Introduction	15
A. Definition of terms	17
B. The development of the concept of the marginal sea	20
1. From the Roman law to the "battle of books"	22
2. The range of cannon	26
3. From the nineteenth century to modern times	30
(a) The writings of publicists	31
(b) The development of the concept in the United States	34
(c) The development of the concept in Great Britain	43
(d) The development of the concept in other nations	50
(e) The concept in international councils	53
II. The United States acquired the territory comprising California from Mexico and it has never granted the lands in the marginal sea to the State	58
A. The original acquisition of California from Mexico	58
B. California's admission to the Union	60
III. The rights of the United States in the marginal sea did not pass to the State. The decisions of this Court holding that the tidelands and the beds of inland navigable waters passed to the new States under the equal footing rule have no application to lands in the marginal sea	67
Introductory. The rule of the tidelands and inland waters cases	67
A. Ownership of the marginal sea, if an attribute of sovereignty, is primarily an attribute of the sovereignty of the National Government rather than that of the State	72
1. The nature of sovereignty in the marginal sea in the light of international law	74
2. The nature of sovereignty in the marginal sea in the light of the framework of government established by the Constitution	82

III. The rights of the United States in the marginal sea did not pass to the State—Continued — Page

B. The thirteen original States did not own the bed of the marginal sea; there is, therefore, no basis for the operation of the "equal-footing" theory. 92

1. Constitutions and statutes. 93

2. Charters and grants of the Crown. 103

3. The Treaty of 1783. 109

4. The courts and other common-law authorities. 111

5. International law. 115

(a) The writings of publicists. 116

(b) Early statutes, treaties, and executive documents of the United States. 121

Statutes. 121

Treaties. 126

Executive Documents. 128

(c) European treaties and decrees. 135

6. By way of summary. 139

C. In any event, the equal footing rule is inapplicable because ownership of the submerged lands is not an attribute of sovereignty at all within the meaning of the equal footing clause. 143

D. This Court never has held that the States own the marginal sea or the soil or minerals thereunder. 153

IV. The United States is not precluded from asserting its rights in the lands involved in this case. 163

A. There has been no acquiescence by the United States as suggested by the State. 165

1. The alleged acceptance of grants or cessions from the States. 166

2. The alleged rulings by the various branches of the Federal Government. 182

(a) Judicial branch. 183

(b) Legislative branch. 185

(c) Executive branch. 189

B. There has been no reliance by the State to its injury or detriment. 698

C. Even if the requisite elements were otherwise present, the principle of estoppel would not apply in this proceeding. 204

1. Estoppel does not ordinarily apply as against the United States. 204

2. No estoppel can arise from the mistaken or unauthorized acts, statements or commitments of officers of the United States. 206

IV. The United States is not precluded from asserting its rights in the lands involved in this case—Continued — Page
C. Even if the requisite elements were otherwise present—Continued
3. Recognition or acquiescence on behalf of the United States, even if authorized, does not necessarily constitute a basis for estoppel or like defense 211
(a) Mining claims on federally owned lands 211
(b) Grazing on the public domain and the forest reserves 213
(c) Unlawful enclosures 214
D. This suit is not barred by either laches or adverse possession 214
E. The issue here involved is not *res judicata* 218
Conclusion 219
Appendix A, Excerpts from the Treaty of Guadalupe Hidalgo, the Act for the Admission of the State of California into the Union, and provisions of the California Constitution 220
Appendix B, Summary Analysis and Classification of Alleged Grants of Interests in Submerged Lands From States to the United States 227

CITATIONS

Cases:

Federal:

Abby Dodge, The, 223 U. S. 166 ..... 155, 160, 163
Alaska Pacific Fisheries v. *United States*, 248 U. S. 78 36
Ann, The, 1 Gall. 62, 1 Fed. Cas. No. 397 34
Apollon, The, 9 Wheat. 362 125
Appleby v. *New York*, 271 U. S. 364 ..... 151, 154
Arkansas v. *Tennessee*, 310 U. S. 563 217
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 ..... 200, 205
Atherton v. *Fowler*, 96 U. S. 513 214
Bacon v. *Walker*, 204 U. S. 311 ..... 153, 157
Baer v. *Moran Brothers Co.*, 153 U. S. 287 19
Bankline Oil Company v. *Commissioner of Internal Revenue*, 90 F. 2d 899, reversed in part, affirmed in part, 303 U. S. 362 ..... 183, 184
Barney v. *Keokuk*, 94 U. S. 324 ..... 70, 195
Beard v. *Federy*, 3 Wall. 478 58
Blight's Lessee v. *Rochester*, 7 Wheat. 535 180
Borax, Ltd. v. *Los Angeles*, 296 U. S. 10 ..... 59, 62, 70, 154
Brant v. *Virginia Coal & Iron Co.*, 93 U. S. 326 199
Brewer Oil Co. v. *United States*, 260 U. S. 77 ..... 64, 148, 149, 150
Brooks v. *Dewar*, 313 U. S. 354 213
Brown v. *Maryland*, 12 Wheat. 419 85
Buford v. *Houtz*, 133 U. S. 320 ..... 212, 213
Burgess v. *Gray*, 16 How. 48 216

Cases—Continued Page
Federal—Continued
Burnet v. *Brooks*, 288 U. S. 378 75
Bybee v. *Oregon & California R'D Co.*, 139 U. S. 663 180
Camfield v. *United States*, 167 U. S. 518 213, 214
Causey v. *United States*, 240 U. S. 399 205
Chinese Exclusion Case, The, 130 U. S. 581 85
Church v. *Hubbart*, 2 Cranch 187 34, 85, 125
Cook v. *United States*, 288 U. S. 102 41, 86
County of Mobile v. *Kimball*, 102 U. S. 691 203
County of St. Clair v. *Lovingston*, 23 Wall. 46 70, 148, 154, 167
Cramer v. *United States*, 261 U. S. 219 208
Cunard S. S. Co. v. *Mellon*, 262 U. S. 100 34
Davis v. *Corona Coal Co.*, 265 U. S. 219 217
Dean v. *City of San Diego*, 275 Fed. 228 185
Del Monte Mining Co. v. *Last Chance Mining Co.*, 171 U. S. 55 212
Den v. *Jersey Co.*, 15 How. 426 70
Donnelly v. *United States*, 228 U. S. 243 70, 148
Escanaba Co. v. *Chicago*, 107 U. S. 678 203
Elizabeth, The, I Paine 10, 8 Fed. Cas. No. 4,352 102
Fong Yue Ting v. *United States*, 149 U. S. 698 74
Forbes v. *Gracey*, 94 U. S. 762 212
Fox River Co. v. *R. R. Comm.*, 274 U. S. 651 154
Gibbons v. *Ogden*, 9 Wheat. 1 85
Gibson v. *Chouteau*, 13 Wall. 92 66, 216
Gillam v. *United States*, 27 F. 2d 296, certiorari denied, 278 U. S. 635 35
Gilman v. *Philadelphia*, 3 Wall. 713 85
Goodtitle v. *Kibbe*, 9 How. 471 70, 148, 150
Great Northern Ry. Co. v. *United States*, 315 U. S. 262 64
Guaranty Trust Co. v. *United States*, 304 U. S. 126 215, 217
Hardin v. *Jordan*, 140 U. S. 371 70, 148
Hardin v. *Shedd*, 190 U. S. 508 70
Hays v. *United States*, 175 U. S. 248 66, 216
Hawkins Point Light House Case, 39 Fed. 77, reversed on other grounds, *sub nom. Chappell* v. *Waterworth*, 155 U. S. 102 181
Helvering v. *Bankline Oil Co.*, 303 U. S. 362 184
Hosmer v. *Wallace*, 97 U. S. 575 214
Humboldt Lumber Manufacturers' Ass'n v. *Christopherson*, 73 Fed. 239 35
Humboldt Lumber Manufacturers' Ass'n, In re, 60 Fed. 428, affirmed, 73 Fed. 239 152
Hungaria, The, 41 Fed. 109 36, 124
Illinois Central Railroad v. *Illinois*, 146 U. S. 387 70, 151, 154
Indiana v. *Kentucky*, 136 U. S. 479 217
James v. *Dravo Contracting Co.*, 302 U. S. 134 153
J. Duffy, The, 14 F. 2d 426, reversed, 18 F. 2d 754 102
Jeems Bayou Club v. *United States*, 260 U. S. 561 207
Jones v. *United States*, 96 U. S. 24 200

Cases—Continued

Federal—Continued

	Page
Jones v. *United States*, 137 U. S. 202	74
Jourdan v. *Barrett*, 4 How. 168	66, 216
Kaiser Wilhelm Der Grosse, The, 175 Fed. 215	152
Ketchum v. *Duncan*, 96 U. S. 659	200
Knight v. *United States Land Ass'n*, 142 U. S. 161	59, 70, 150, 154
Lawton v. *Steele*, 152 U. S. 133	157
Larson v. *South Dakota*, 278 U. S. 429	64
Leavenworth, L. & G. R. Co. v. *United States*, 92 U. S. 733	64
Lee Wilson & Co. v. *United States*, 245 U. S. 24	14, 145, 165, 202, 207
Legal Tender Cases, 12 Wall. 457	75
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U. S. 82	181
Light v. *United States*, 220 U. S. 523	205, 213
Lighthouse at Hell Gate, In re, 196 Fed. 174, affirmed *sub nom. Lawrence Ward's Island Realty Co.* v. *United States*, 209 Fed. 201	181
Lord v. *Steamship Co.*, 102 U. S. 541	85
Louisiana v. *Mississippi*, 202 U. S. 1	155, 158
Manchester v. *Massachusetts*, 139 U. S. 240	98, 155, 156, 157, 160, 162
Mann v. *Tacoma Land Co.*, 153 U. S. 273	62, 70, 195
Martin v. *Waddell*, 16 Pet. 367	67, 69, 70, 145, 153, 155
Mason Co. v. *Tax Comm'n*, 302 U. S. 186	153
Massachusetts v. *New York*, 271 U. S. 65	70, 73
Maul v. *United States*, 274 U. S. 501	86
McCready v. *Virginia*, 94 U. S. 391	70, 154, 157, 162
McGilvra v. *Ross*, 215 U. S. 70	70
Merryman v. *Bourne*, 9 Wall. 592	58, 180
Miller v. *United States*, 88 F. 2d 102	152
Missouri v. *Holland*, 252 U. S. 416	88
Mobile Transportation Co. v. *Mobile*, 187 U. S. 479	70, 151
Morrow v. *Whitney*, 95 U. S. 551	66, 216
Mumford v. *Wardell*, 6 Wall. 423	70, 148, 154
Murray v. *Hildreth*, 61 F. 2d 483	152
Newhall v. *Sanger*, 92 U. S. 761	62
North American Com. Co. v. *United States*, 171 U. S. 110	157
Northern Pac. Ry. Co. v. *McComas*, 250 U. S. 387	66, 216
Oklahoma v. *Texas*, 258 U. S. 574	64
Oaksmith's Lessee v. *Johnston*, 92 U. S. 343	216
Oklahoma v. *Texas*, 268 U. S. 574	149, 199
Omaechevarria v. *Idaho*, 246 U. S. 343	153, 157, 213
Oregon & Cal. R. R. v. *United States*, 238 U. S. 393	204
Packer v. *Bird*, 137 U. S. 661	70
Penhallow v. *Doane*, 3 Dall. 54	75, 77
Philadelphia Co. v. *Stimson*, 223 U. S. 605	85
Pine River Logging Co. v. *United States*, 186 U. S. 279	207
Pollard's Lessee v. *Hagan*, 3 How. 212	68, 69, 70, 145, 147, 154
Port of Seattle v. *Oregon & W. R. R.*, 255 U. S. 56	70, 151, 154

Cases—Continued Page
Federal—Continued
Reichelderfer v. *Quinn*, 287 U. S. 315 64
Rhode Island v. *Massachusetts*, 4 How. 591 217
Royal Indemnity Co. v. *United States*, 313 U. S. 289 210
Ruppert, v. *Caffey*, 251 U. S. 264 75
San Francisco v. *Le Roy*, 138 U. S. 656 59, 154
Sanitary District v. *United States*, 266 U. S. 405 204, 217, 218
Scott v. *Lattig*, 227 U. S. 229 70, 148
Scranton v. *Wheeler*, 179 U. S. 141 85, 181
Shively v. *Bowlby*, 152 U. S. 1 70, 111, 113, 148, 150, 154
Silz v. *Hesterberg*, 211 U. S. 31 157
Sioux Tribe v. *United States*, 316 U. S. 317 210
Skiriotes v. *Florida*, 313 U. S. 69 152, 157, 162
Smith v. *Maryland*, 18 How. 71 70
Soult v. *L'Africaine*, Bee 204, 22 Fed. Cases No. 13,179, p. 805 124
South Carolina v. *Georgia*, 93 U. S. 4 175
Spalding v. *United States*, 17 F. Supp. 957, 966, reversed, 97 F. 2d 697, 701, certiorari denied, 305 U. S. 644 183
Sparrow v. *Strong*, 3 Wall. 97 212
Sparks v. *Pierce*, 115 U. S. 408 216
Stanley v. *Schwalby*, 147 U. S. 508 217
Surplus Trading Co. v. *Cook*, 281 U. S. 647 153
Turner v. *Williams*, 194 U. S. 279 85
United States v. *Alabama*, 313 U. S. 274 1
United States v. *Arredondo*, 6 Pet. 691 63
United States v. *Belmont*, 301 U. S. 324 75, 76, 79
United States v. *Carrillo*, 13 F. Supp. 121 152, 167
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53 70
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592 181
United States v. *Commodore Park*, 324 U. S. 386 175
United States v. *Coronado Beach Co.*, 255 U. S. 472 59
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304 75, 76, 78, 90, 157
United States v. *Dern*, 289 U. S. 352 151
United States v. *Fitzgerald*, 15 Pet. 407 210
United States v. *Griffen and Brailsford*, 5 Wheat. 184 152
United States v. *Grimaud*, 220 U. S. 506 213
United States v. *Holt Bank*, 270 U. S. 49 70, 148, 150, 151, 154
United States v. *Insley*, 130 U. S. 263 205, 215
United States v. *Kirkpatrick*, 9 Wheat. 720 215
United States v. *Knight*, 14 Pet. 301 217
United States v. *Michigan*, 190 U. S. 379 216
United States v. *Mission Rock Co.*, 189 U. S. 391 15, 70, 218, 219
United States v. *Nashville, &c Ry. Co.*, 118 U. S. 120 216

Cases—Continued

Federal—Continued Page

United States v. *Newark Meadows Imp. Co.*, 173 Fed. 426.. 35, 103, 152

United States v. *New York S. S. Co.*, 269 U. S. 304..... 85

United States v. *Oregon*, 295 U. S. 1..... 64, 70, 73, 149, 154

United States v. *San Francisco*, 310 U. S. 16..... 197, 206, 207

United States v. *Smith*, 1 Mason 147, 27 Fed. Cas. No. 16,337..... 152

United States v. *Standard Oil Company of California*, 20 F. Supp. 427, affirmed, 107 F. 2d 404, certiorari denied, 309 U. S. 673..... 200, 208

United States v. *Summerlin*, 310 U. S. 414..... 215, 217

United States v. *Thompson*, 98 U. S. 486..... 217

United States v. *Utah*, 283 U. S. 64..... 64, 70, 149

United States v. *Wong Kim Ark*, 169 U. S. 649..... 74

Utah v. *United States*, 284 U. S. 534..... 206

Utah Power & Light Co. v. *United States*, 243 U. S. 389.... 205, 206, 208, 215

Van Brocklin v. *State of Tennessee*, 117 U. S. 151..... 205

Walker v. *State Harbor Commissioners*, 17 Wall. 648..... 19

Water Power Co. v. *Water Commissioners*, 168 U. S. 349.... 70

Watkins v. *Holman*, 16 Pet. 25..... 180

Weber v. *Harbor Commissioners*, 18 Wall. 57..... 70, 151, 154, 155

Whiteside v. *United States*, 93 U. S. 247..... 210

Wilber Nat. Bank v. *United States*, 294 U. S. 120..... 200

State and Territorial:

Alaska Gold Recov. Co. v. *Northern M. & T. Co.*, 7 Alaska 386..... 36

Arnold v. *Mundy*, 1 Halsted 1 (N. J.)..... 113

Boone v. *Kingsbury*, 206 Cal. 148, appeal dismissed and certiorari denied, 280 U. S. 517..... 35, 71, 151, 184, 187

Browne v. *Kennedy*, 5 Harris & Johnson 195 (Md.)..... 113

City of Long Beach v. *Marshall*, 11 Cal. 2d 609..... 151

Commonwealth v. *Boston Terminal Co.*, 185 Mass. 281..... 35, 71

Commonwealth v. *City of Roxbury*, 9 Gray (Mass.) 451..... 153

Corfield v. *Coryell*, 4 Wash. 371..... 106

Dunham v. *Lamphere*, 3 Gray (69 Mass.) 268..... 35, 98

Hogg v. *Beerman*, 41 Ohio St. 81..... 36

Mahler v. *Transportation Co.*, 35 N. Y. 352..... 102

Lipscomb v. *Gialourakis*, 101 Fla. 1130..... 35, 71

People ex rel. Mexican Telegraph Co. v. *State Tax Commission*, 219 App. Div. (N. Y.) 401..... 35, 71

State ex rel. Luketa v. *Pollock*, 136 Wash. 25..... 35, 71

Foreign:

Anna, The, 5 C. Rob. 373, 165 Eng. Rep. 809..... 44

Attorney-General v. *Chambers*, 4 De G. M. & C. 206..... 50

Attorney-General for British Columbia v. *Attorney-General for Canada*, [1914] A. C. 153..... 45, 48, 74

Cases—Continued Page

Foreign—Continued

Attorney-General for the Dominion of Canada v. *Attorneys-General for the Provinces*, [1898] A. C. 700 ..... 91, 153

Benest v. *Pipon*, 1 Knapp 60, 12 Eng. Rep. 243 113

Blundell v. *Catterall*, 5 B. & Ald. 268, 106 Eng. Rep. 1190 .. 113

Case of the Royal Fishery of the Banne, The, Sir John Davies' Reports 149 113

Elizabeth, The, Ross, Master, 4 Moore, International Adjudications 529 133

Fanny, The, Pile, Master, decided October 16, 1798, 4 Moore, International Adjudications (1931), 518 133

Free Fishers and Dredgers of Whitstable, The v. *Gann*, 11 C. B. (N. S.) 387 50

Gammel v. *Commissioners of Woods and Forests*, 3 MacQueen 419 50

General Iron Screw Collier Co. v. *Schurmanns*, 1 John & Hem., 180 50

Johnson v. *Barret*, Aleyn, 10, 82 Eng. Rep. 887 113

Leda, The, Swa. Adm. 40 50

Lord Advocate v. *Clyde Navigation Trustees*, 19 Rettie 174 .. 50

Lord Advocate v. *Wemyss*, [1900] A. C. 48 ..... 50, 109

Lord Fitzhardinge v. *Purcell*, [1908] 2 Ch. 139 50

Queen, The v. *Keyn*, L. R. 2 Exch. Div. 63, (1876) 23, 45, 46, 47, 48, 75, 114, 118, 125, 136, 138, 140

Rex v. *49 Casks of Brandy*, 3 Hagg. Ad. 257, 166 Eng. Rep. 401 113

Secretary of State for India v. *Chelikani Rama Rao*, L. R. 43 Ind. App. 1926 (191) 45, 50, 115

Twee Gebroeders, The, 3 C. Rob. 162, 165 Eng. Rep. 422 44

Federal Constitution and Statutes:

Constitution of the United States:

Preamble 83

Art. I, Sec. 8 ..... 84, 85, 87

Art. I, Sec. 10 ..... 84, 85, 87

Art. II, Sec. 2 84

Art. IV, Sec. 3, cl. 2 209

Art. IV, Sec. 4 83

Ordinance of 1787, 1 Stat. 51, 53 69

Act of August 4, 1790 (1 Stat. 145, 157, 158, 164, 175) 86, 125

1 Stat. 369, 520, 521 125

Act of June 5, 1794 (1 Stat. 381, 384) 124

Act of March 2, 1799 (1 Stat. 627, 648, 668) 86, 125

Act of April 8, 1812 (2 Stat. 701) 125

Act of March 2, 1819 (3 Stat. 489) 125

Act of September 4, 1841 (5 Stat. 453, 455, 43 U. S. C. 857) .. 65

Joint Resolution of Annexation of Texas March 1, 1845, Sec. 2 (5 Stat. 797) 149, 150, 173

Federal Constitution and Statutes—Continued — Page

Act of September 9, 1850 (9 Stat. 452) — 60, 61, 223
Sec. 1 — 4, 8
Sec. 3 — 4
Act of September 28, 1850 (9 Stat. 519–520, 43 U. S. C. 982 ff) — 65
Act of March 3, 1853 (10 Stat. 244, 246, 248) — 65
Act of July 2, 1862 (12 Stat. 503–505, 7 U. S. C. 301–308) — 65
Act of July 23, 1866 (14 Stat. 218, 43 U. S. C. 865, 987) — 65
Rev. Stat. (1874) §§ 2760, 2867, 2868, 3067 — 86
Rev. Stat. § 355 — 191
Act of February 25, 1885 (23 Stat. 321, 43 U. S. C. 1061) — 214
Act of August 18, 1894 (28 Stat. 422, 43 U. S. C. 641) — 65
Act of April 21, 1910, Sec. 8 (36 Stat. 326, 328) — 37
Act of July 25, 1912 (37 Stat. 201, 220) — 188
Act of August 24, 1912, Sec. 9 (37 Stat. 499, 501) — 37
38 Stat. 800 — 86
Act of June 15, 1917, Sec. 3 (40 Stat. 217, 220) — 37
Mineral Leasing Act (41 Stat. 437, 30 U. S. C. 181 ff) — 195, 212, 213
Tariff Act of 1922 (42 Stat. 858, 979, 980, 981) — 86
Act of June 7, 1924, Sec. 2 (43 Stat. 604, 605, 33 U. S. C. 432 (c)) — 37
Act of March 3, 1925 (43 Stat. 1186, 1189) — 188
Codification of International Law at The Hague in 1930 (46 Stat. 146) — 56
Tariff Act of 1930 (46 Stat. 590, 747) — 86
Act of Congress of June 15, 1933 (48 Stat. 150) — 169
Act of June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976, 43 U. S. C. 315) — 213
Anti-Smuggling Act, 49 Stat. 517, 19 U. S. C. 1701 — 86, 87
Act of June 29, 1936 (49 Stat. 2026, 2027) — 65
Northern Pacific Halibut Act of 1937 (50 Stat. 325, 16 U. S. C. 772) — 88
Joint Resolution of July 9, 1937 (50 Stat. 488, 490–491) — 188
Act of June 2, 1939 (53 Stat. 798, 800) — 188
Migratory Bird Treaty Act, 16 U. S. C. 703–711 — 88
30 U. S. C. 21, *et seq* — 212

State Constitutions and Statutes:
California Constitution of 1849, 8 Cal. Stat. (1850), pp. 24–36:
Art. XII — 60, 61, 225
California Constitution of 1879:
Art. XXI, Sec. 1 — 4, 61, 226
Art. XXII, Sec. 1 — 61
Act of the California Legislature of March 15, 1889 (Stats. 1889, p. 201) — 168
Act of March 2, 1897, (Calif. Stats. 1897, p. 51) — 171

State Constitutions and Statutes—Continued Page
Act of March 9, 1897 (Calif. Stats. 1897, p. 74). 170, 171, 188, 191
General Law, Chapter 303, Statutes and Amendments of California, 1921, as amended 3
California Public Resources Code, Secs. 6871–6878 187
State Lands Act of 1938, Cal. Stats. Ex. Sess., 1938 187
Act of February 17, 1783, Colonial Records of the State of Georgia, Vol. 19, pt. 2 (1911), p. 214 95
Georgia Constitution of 1798, Art. I, Sec. 23, 2 Thorpe, *American Charters, Constitutions and Organic Laws* (1909), p. 794 95
Ga. Laws, 1916, p. 29 98
Acts and Resolves, Massachusetts Bay, (1737), vol. 12, pp. 397, 407 99
Acts and Laws of the Province of Massachusetts Bay (1759), c. IV, pp. 389, 390, 391 94
Laws of Massachusetts passed by the General Court (Begun on May 27, 1789), Vol. II, c. XXV, pp. 25, 27 94
Mass. Acts, 1859, c. 289, p. 640 97, 98
Mass. Acts 1899, c. 369 99
Act of the Legislature of Mississippi (Laws, 1858–59, p. 49) 169
Act of the Legislature of Mississippi of April 26, 1940 (Laws, 1940, p. 556) 169
New Hampshire Laws, vol. 2, Province Period, 1702–1745 (Concord, 1913), pp. 790–794 99
Laws of New Hampshire (1792), pp. 161–162, Act of June 16, 1791 96
New Hampshire Laws, 1901, c. 115, p. 620 98
N. J. Laws (1906), c. 260, p. 542 102
1 N. Y. Rev. Stat. (1829), Part I, c. I, tit. I, p. 65 101
N. Y. Laws, 1834, c. 8, p. 9 101
N. Y. Consol. Laws, c. 57, art. 2, sec. 2–7 101
North Carolina Declaration of Rights of 1776, Art. XXV, 5 Thorpe, *American Charters, Constitutions and Organic Laws* (1909), p. 2789 95
North Carolina Constitutions of 1868 and 1876, Art. I, sec. 34 98
R. I. Gen. Stats. (1872), Tit. I, c. I, sec. I 102
1 Statutes at Large (S. C. 1836), pp. 404, 405–424 96
1 R. S. (S. C. 1872) pp. 2–3 98
S. C. Civil Code (1922) Part I, Tit. I, c. I, sec. 1 98
South Carolina Code, Secs. 2042 (36, 37, 38, 41, 45, 46, 53, 54) 172
10 Henn. Stat. 226 (Va., 1780) 101
Virginia Code (1849), tit. I, c. I, sec. 1 101
Virginia Code (1887), sec. 1338 101
Virginia Code (1924), sec. 3573 101
Sess. Laws (Wash.) 1889–1890, p. 263 172
Sess. Laws (Wash.) 1909, p. 390 175

Foreign Statutes: Page
Argentina, Codigo Civil (1944), Art. 2.340 52
Chile, Codigo Civil (1945), Art. 593 52
Cornwall Submarine Mines Act of 1858, 21 & 22 Vict., c. 109 45, 46, 91
Ecuador, Codigo Civil (1930), Art. 582 52
El Salvador, Codification de Leyes, Patrias (1879), p. 343 52
Guatemala, Codigo Civil (1937), Art. 419 52
Mexico, Ley de Aguas de Propriedad Nacional, Diario Oficial, August 31, 1934, Art. 1 53
Territorial Waters Jurisdiction Act of 1878, 41 & 42 Vict., c. 73, sec. 7 45
Treaties:
Treaty between the Federated States of Belgium and the Kingdom of Algiers (1662), Art. IV, Crocker, *The Extent of the Marginal Sea* (1919), p. 511 136
Treaty of Commerce and Alliance between Great Britain and Spain (1667), Art. XIV, Crocker, *The Extent of the Marginal Sea*, pp. 533–534 136
Early treaties of the United States, 8 Stat. 28, 48, 74, 92, 148 136
Treaty of 1778 with France, 8 Stat. 12:
Art. VI 126
Art. VII 126
Art. IX 87, 126
Art. XII 223
Treaty of 1782 with The Netherlands, 8 Stat. 32, 34, Art. V 126
Treaty of Peace between Great Britain and the United States, September 3, 1783, 8 Stat. 80, 81–82:
Art. II 109, 127
Art. III 126
Treaty of September 10, 1784, between Spain and Tripoli, Art. 6, translation in Crocker, *The Extent of the Marginal Sea* (1919), p. 623 136
Treaty of 1785 with Prussia, 8 Stat. 84, 86–88, Art. VII 126
Treaty of 1794 with Great Britain, 8 Stat. 116, 128, Art. XXV 126, 127
Treaty of 1795 with Spain, 8 Stat. 138, 140, Art. II 128
Treaty of 1799 with Prussia, 8 Stat. 162, 164, Art. VII 126
Convention of 1818 with Great Britain, 8 Stat. 248, 249 87
Treaty of Guadalupe Hidalgo, 9 Stat. 922 37, 58, 59
Art. V 59, 220
Art. VIII 3, 59, 222
Art. XII 4
Reciprocity Treaty of 1854, 10 Stat. 1089–1090 88
Treaty of 1871 with Great Britain, 17 Stat. 863, 869–870 88
Isthmian Canal Convention of 1904, Art. II, 33 Stat. (Part 2) 2234–2235 42, 79
Treaty with Great Britain, 43 Stat. (Part 2) 1761 41, 86
Treaty with Norway, 43 Stat. (Part 2) 1772 41
Treaty with Denmark, 43 Stat. (Part 2) 1809 41

Page

Treaties—Continued

Treaty with Germany, 43 Stat. (Part 2) 1815 41
Treaty with Italy, 43 Stat. (Part 2) 1844 41
Treaty with Panama, 43 Stat. (Part 2) 1875 41
Treaty with The Netherlands, 44 Stat. 2013 41
Treaty with Cuba, 44 Stat. (Part 2) 2395 41
Treaty with France, 45 Stat. (Part 2) 2403 41
Treaty with Greece, 45 Stat. (Part 2) 2736 41
Treaty with Japan, 46 Stat. (Part 2) 2446 41
Convention of 1937 with Canada, 50 Stat. (Part 2) 1351 .. 88

Congressional and Executive Material:

Congressional:

21 Cong. Globe 592, 798, 944 63
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H. Doc. 1390, 62d Cong., 3d Sess 173, 174
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4 Journals of Congress, 198 ..... 121, 123
6 Journals of Congress, 146–147 69
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pp. 67, 68 121
pp. 185, 186–187 122
pp. 225–226 122
S. 169, 31st Cong., 1st Sess 63
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Executive Order of August 30, 1847 169
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War Department:
Opinion of the Judge Advocate General, May 27, 1940 169
Letter dated March 4, 1890, from Col. G. H. Mendell, to the Chief of Engineers 171
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Letter dated March 27, 1941, of the District Engineer, to the State of California 193
Miscellaneous:
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17 A. J. I. L. Supp. 195, 198 55
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Page

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Volume 1 ... 106, 108
Volume 2 ... 107
Volume 3 ... 96, 104, 105

Miscellaneous—Continued Page
Thorpe—Continued
Volume 4 ..... 107, 108
Volume 5 ..... 104, 105, 106
Volume 6 107
Volume 7 ..... 102, 106, 108
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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 12—ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR JUDGMENT

JURISDICTION

The jurisdiction of this Court rests upon Article III, sec. 2, cl. 2 of the Constitution. Cf. *United States* v. *Alabama*, 313 U. S. 274.

QUESTIONS PRESENTED

1. Whether the rights to the lands underlying the Pacific Ocean within three miles of the coast of the State of California, beyond low-water mark and outside any bays, harbors, or other inland waters, belong to the United States, or whether they passed to the State as a result of its admission to the Union on an "equal footing" with the original States. (No question is here presented as to rights in the so-called tidelands or in bays, harbors, or other inland waters.)

2. Whether there has been any such recognition by the United States of the State's claim to the area in controversy as to preclude the United States from asserting its rights at this time; further, whether the maintenance of this suit is barred by laches, adverse possession, or *res judicata*.

STATEMENT

This suit was instituted for the purpose of establishing the rights of the United States in the bed of that portion of the Pacific Ocean adjacent to the coast of the State of California which lies outside the inland waters of the State and which extends seaward for three miles from the low-water mark on the open coast. No claim is here made to any lands under ports, harbors, bays, rivers, lakes, or any other inland waters; nor is claim here made to any so-called tidelands, namely, those lands that are covered and uncovered by the daily flux and reflux of the tides (i. e., those lands lying between the ordinary high- and low-water marks). There are decisions of this Court which appear to hold that titles to the beds of ports, harbors and other inland waters as well as title to the tidelands reside in the State. The Government does not challenge the results in those decisions. This case is limited strictly to lands within the three-mile belt on the open sea.

It is alleged in the Complaint that the United States is the owner in fee simple of, or possessed

of paramount rights in, these submerged lands; that California claims some right, title or interest in these lands, and has by statute (General Law, Chapter 303, Statutes and Amendments of California, 1921, as amended) undertaken to provide for the leasing of these lands for the exploitation of petroleum and other deposits; that the State has executed many leases under that law; and that the lessees have extracted and are continuing to extract large quantities of petroleum and other minerals from these lands (pp. 6–8). The Government asks for a decree declaring the rights of the United States as against the State of California in the area in question and enjoining the State and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States (p. 11).

In 1848, the United States, in its capacity as national sovereign, acquired from the Republic of Mexico complete dominion over and all proprietary interests in a vast expanse of territory flanked on the west by the Pacific Ocean and known as Upper California. Treaty of Guadalupe Hidalgo, 9 Stat. 922, signed February 2, 1848, proclaimed July 4, 1848. The only proprietary rights excepted from the transfer were those belonging to Mexican citizens within the territory (Article VIII), none of which is here involved. In consideration of that and other new territory thus acquired, the United States undertook to pay

fifteen million dollars to the Republic of Mexico (Article XII). By Section 1 of the Act of September 9, 1850 (9 Stat. 452), California was admitted into the Union "on an equal footing with the original States in all respects whatever", but Section 3 provided that admission was "upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned".

The Constitution of the State of California describes its western boundary as extending "three English miles" into the Pacific Ocean. See *infra*, pp. 60–61, 81–82; Cal. Const. of 1879, Art. XXI, Sec. 1. The three-mile limit, which constitutes the outer boundary of the United States as recognized in international law, encompasses three nautical miles, or three geographical miles, which are approximately equal to three and one-half English miles.[1] Thus, the claims of California to the submerged lands appear to fall short by about one-half mile of the outer boundary of the United States, and the area in controversy herein would therefore seem not to include this outermost strip.

The United States does not challenge the provisions of the California Constitution which fix the

[1] See *infra*, pp. 19–20.

western boundary of the State: it concedes that the State has legislative jurisdiction over the area from the low-water mark to the outer boundary of the State just as the State has jurisdiction over many areas of dry land which are owned by the United States. The Government contends only that the area in question became the property of the United States and that it has never conveyed that area to the State.

California has answered[2] with a denial of the Government's claim of ownership and an affirmative defense (First Affirmative Defense) of ownership in the State. Under that affirmative defense, it does not deny that the United States acquired title from Mexico, and it does not point to any *express* conveyance from the United States to the State; its claim to ownership rests in substance on the ground that the Act of Admission of 1850 constituted an *implied* conveyance of the sub-

[2] The State originally filed an 822-page answer consisting of three volumes. The United States filed a Motion to Strike Answer on the ground that the answer was "prolix and so replete with arguments, evidentiary matter and conclusions, both of law and of fact, that it is virtually impossible to segregate and identify the well-pleaded facts for the purpose of determining the issues intended to be tendered." Thereafter, the Court, on April 22, 1946, ordered the Attorney General of the State to file "a succinct statement, without argument or statement of evidence, of the several propositions of law and fact, separately stated and enumerated, which he deems to have been placed in issue by the answer." A statement in response to that order was filed by the State, and the Government submitted a memorandum with respect thereto. A

merged lands to the State, and that contention rests in turn on the "equal footing" clause quoted above (p. 4). In addition, the State has set up a number of other affirmative defenses (Second, Third, Fourth, Fifth, Sixth and Seventh Affirmative Defenses) which, in one form or another, seek to preclude the United States from maintaining this suit upon the ground of estoppel or some related principle, laches, adverse possession, or *res judicata*.

Thereupon, the United States, reserving the right to trial on any issues of fact which cannot be resolved by judicial notice, moved the Court for judgment as prayed in the Complaint, for the reason that the purported defenses set forth in the State's Answer are insufficient in law. The Court then entered an order setting the cause "for argument on the pleadings." Sup. Ct. Journal, 1945 Term, p. 269.

"pre-trial conference" was then held in Mr. Justice Black's chambers, with the result that the State submitted a new answer on May 21, 1946, with the proviso that its original answer remain on file as an Appendix to the new answer, for such use as the Court or the parties might wish to make of it, such Appendix, however, "not to be treated as a part of the pleadings" and the Government "to be without any obligation to admit, deny, or otherwise take into account any of the material contained therein [original Answer] as a pleading or part of a pleading". See State's Motion Pursuant to Pre-Trial Conference for Leave to File Answer, p. 1. The United States indicated no opposition to that motion, and, in the circumstances, consented to the withdrawal of its Motion to Strike Answer.

SUMMARY OF ARGUMENT

I

Point I is intended to supply certain introductory material which may be helpful in considering this case. Thus, it defines such terms as "marginal sea", "inland waters", and "tidelands", and it traces the development of the concept of the three-mile belt with particular reference to property rights therein. Although some nations, including England, had made broad claims to exclusive rights in entire oceans during the middle ages and as late as the seventeenth century, the theory of rights in a marginal sea is a relatively modern one and derives from the writings of publicists in the eighteenth century. Moreover, the concept of property rights in the three-mile belt did not become accepted in international law until a considerably later period. After discussing these beginnings, Point I proceeds to describe the subsequent development of the theory and the extent of its adoption by the United States and other nations.

II

The United States acquired California from Mexico under the Treaty of Guadalupe Hidalgo in 1848. Subsequently, in 1850, California became a State, and was admitted to the Union on an "equal footing" with all other States. It thus became endowed with all the governmental powers

that a State must have under our Constitution. It did not, however, succeed to the rights of the United States to property within its borders, except to the extent that such property rights were transferred to it by the United States. The vast area of national forest within California is but an example of property which the United States owned prior to California's becoming a State and which it continued to own after California was admitted to the Union. And in a variety of situations, the United States has affirmatively authorized grants of specified areas to the State; school lands, swamp lands, desert lands, and lands for State parks are familiar examples of lands expressly granted to the State by the United States. However, it is undisputed that the United States has not, either by statute, or otherwise, made any express conveyance of the submerged lands within the three-mile belt. And it is the Government's contention that there has been no *implied* conveyance. The State, on the other hand, contends, in substance, that a conveyance must be implied from the language of the Act under which California was admitted to the Union; and the crucial language upon which it relies is contained in Section 1 which declares that California is admitted "on an equal footing with the original States in all respects whatever." It is the Government's position that this language cannot be used as the basis for implying a grant

of the three-mile belt, and we are not aware of any other statutory provision which can be urged as the basis for such a conveyance.

III

The State's contention rests upon a number of decisions of this Court which appear to hold that the original States owned the tidelands (i. e., the lands between the high and low water marks) and the lands under bays, harbors, rivers and the like; that the ownership of those lands was so closely identified with State sovereignty as to constitute one of the indicia of State sovereignty; and that, therefore, a statutory provision calling for admission of a new State "on an equal footing with the original States" necessarily means that such new State must acquire title to such lands within its borders. It is the Government's position that those cases deal only with tidelands and lands under inland waters; that no decision of this Court has ever placed the title to lands under the three-mile belt in the individual States; and that there are pivotal distinctions between the three-mile belt on the one hand and the tidelands and inland waters on the other hand. The decisions on the inland waters and tidelands are not controlling for the following reasons:

1. If ownership of submerged lands is an attribute of sovereignty, as the foregoing decisions seem to hold, then the ownership of the lands

under the three-mile belt is more closely related to *national* sovereignty than to local sovereignty. The three-mile belt is a creature of international law and such governmental rights and powers as arise therefrom depend entirely upon the national government and may be vindicated as against other nations only by the national government. The primary governmental aspects of the three-mile belt are predominantly to be associated with the national rather than the State government. Accordingly, there is no basis for implying a grant of the three-mile belt to the new States. For, in order to imply a grant, ownership of these submerged lands must be so closely related to State sovereignty that the "equal footing" clause requires the transfer of ownership to the State; but here the dominant sovereignty is that of the national government and it would do violence to the "equal footing" clause to take these submerged lands away from the national sovereign on the theory that sovereignty and ownership go hand in hand.

2. The original States did not own the three-mile belt at the time of the formation of the Union. Those States did not at that time claim any ownership in the marginal sea, and the concept of the three-mile belt in the territorial sense, susceptible of ownership, had not yet crystallized in the law of nations. Accordingly, when the three-mile belt subsequently became a reality

under the sponsorship of the national government, such property rights as derive therefrom emerged as rights of the national government. It is clear, therefore, that the cases dealing with the equal footing clause can have no application here. If the original States did not own the three-mile belt, there can be no basis for giving that area to the new States on a theory that all States must stand on an equal footing in respect of such lands.

3. Finally, even if each of the original States did own the marginal sea, California did not acquire title under the "equal footing" provision for an entirely different reason. We have assumed up to this point that ownership of the submerged lands is one of the indicia of sovereignty, but have sought to show that submerged lands under the three-mile belt are to be identified more with national sovereignty than with local sovereignty. However, we submit that ownership of submerged lands is not related to sovereignty at all, and that the decisions of this Court dealing with the tidelands and lands under inland waters have proceeded upon a false premise. The Government does not ask that those cases be overruled; indeed, it suggests that in the interest of clarity and certainty they be reaffirmed herein; but the Government does ask that the unsound rule of those cases be not extended to the marginal sea. Accordingly, if the Court should agree with the contention that ownership of the lands is not

a necessary concomitant of sovereignty, the "equal footing" clause cannot be used as the basis for implying a grant of these lands to the State.

IV

In addition to claiming that it has title to the bed of the marginal sea, the State has made sweeping allegations calculated to preclude the United States from maintaining this suit. The defenses suggested by these allegations include estoppel or some related doctrine, laches, adverse possession, and *res judicata*. These contentions are amplified in the Appendix to the State's Answer where hundreds of pages are devoted to the details of specific instances in which the United States is said to have recognized the alleged rights of the State, notably by accepting grants of submerged lands from California and other States.

1. In the first place, a careful examination of the material presented by the State fails to disclose any such pattern of long-continued and uniform acquiescence in its alleged rights, as is suggested by the State. The overwhelming majority of instances referred to by the State involve either tidelands or bays, harbors, rivers, and the like. The only instances clearly involving the marginal sea are few in number, and, in general, represent merely isolated efforts by government officers to deal with a particular situation in a practical manner. They certainly do not repre-

sent any general or long-continued policy of the United States with respect to the ownership of the bed of the marginal sea. Contrary to the State's allegations, neither the federal courts nor Congress have recognized the State's claims to the marginal sea. Nor has there been any such recognition by the executive departments of the Government. To be sure, there were rulings by the Department of Interior in which it was stated that California owned the bed of the marginal sea. But the majority of these rulings were also based upon other grounds, and it was plainly stated in some of them that "it is for the Federal courts" to determine "any question of title to such lands as between the State of California and the United States."

2. Apart from the fact that there can be no estoppel or like defense where the condition of the title is known to both parties or where both have the same means of ascertaining the truth, it is clear that the State fails to sustain its position that it has relied upon the alleged recognition of its title to its injury or detriment. Many of the actions upon which the State bases its claim of reliance involved lands which are not in the marginal sea at all, and it is difficult to perceive how any satisfy the requirement of reliance to the State's detriment. To be sure, there may have been expenditures by private lessees. But it must

be borne in mind that the area thus exploited constitutes only a tiny fraction of the entire sweep of the three-mile belt along the coast, and that by far the greater portion of the three-mile belt is as yet unoccupied and undeveloped. Accordingly, while it might be appropriate for Congress to recognize in some manner the possible equities of those who have made expenditures in the three-mile belt, there is no reason why the United States should be precluded from asserting its right along the coast as a whole (cf. *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 32).

3. Moreover, even if the requisite elements were otherwise present, the doctrine of estoppel would not apply in this proceeding. Apart from the general principle that estoppel does not ordinarily apply as against the United States, no estoppel can arise here from any possible mistaken or unauthorized acts, statements or commitments of officers of the United States.

Furthermore, even if recognition or acquiescence on behalf of the United States were authorized, there would not necessarily be a basis for estoppel or like defense. On more than one occasion in the history of this country, the United States, through its executive and legislative branches, has acquiesced in or even encouraged certain uses of its property by others, without precluding a subsequent assertion of its full right and title.

4. This suit is not barred by laches or adverse possession. Ownership of the three-mile belt has become a question of major concern only in recent years. It was not until 1921 that the State of California enacted its legislation for the leasing of such lands, and it was not until some years later, after litigation in the State courts, that it actually began to grant leases generally in this area. Viewing the matter in perspective, it may be said that the investigation of the problem by the Federal Government and the institution of this proceeding were not characterized by any undue delay. Moreover, it is firmly established that neither laches nor adverse possession may be urged as a defense against the United States.

5. The State urges that the issue is *res judicata* by reason of the decision in *United States* v. *Mission Rock Co.*, 189 U. S. 391. That case involved lands wholly within San Francisco Bay, and therefore cannot be regarded as a determination of rights in the marginal sea.

ARGUMENT

I

INTRODUCTION

Essential to a resolution of the basic issue in this case—the validity of the conflicting claims of the United States and of the State of California to proprietary rights in the bed of the ocean

adjacent to the coast of California—is some familiarity with the terms used in this field and with the history of the development of the various concepts of the rights of nations in the seas. It is in an effort to meet this need in a convenient form that Point I of our brief is submitted.[3]

[3] The following are helpful references in this field:

TREATISES: Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927); Fulton, *The Sovereignty of the Sea* (1911); Meyer, *Extent of Jurisdiction in Coastal Waters* (1937); Latour, *La Mer Territoriale* (1889); Gidel, *Le Droit International Public de la Mer* (1934); Fenn, *Origin of the Right of Fishery in Territorial Waters* (1926); Hall, *A Treatise on International Law* (7th Ed., 1917), pp. 144–165; 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945), pp. 451–457; Lawrence, *The Principles of International Law* (7th Ed., (1923)), pp. 138–140; 1 Moore, *International Law Digest* (1906), pp. 698–735; 1 Oppenheim, *International Law* (5th Ed., 1937), pp. 381–395, 461–465; Riesenfeld, *Protection of Coastal Fisheries Under International Law* (1942); Westlake, *International Law* (1910), Part I, pp. 187–196; 1 Wharton, *International Law Digest* (2d Ed., 1887), pp. 100–115.

PERIODICALS: Baty, *The Three Mile Limit* (1928), 22 A. J. I. L. 503; Brown, *The Law of Territorial Waters* (1927), 21 A. J. I. L. 101; Conboy, *The Territorial Sea* (1924), 2 Can. Bar Rev. 8; Fenn, *Origins of the Theory of Territorial Waters* (1926), 20 A. J. I. L. 465; Fraser, *The Extent and Delimitation of Territorial Waters* (1926), 11 Corn. L. Q. 455; Masterson, *Territorial Waters and International Legislation* (1929), 8 Ore. L. Rev. 309; *Power of a State to Extend its Boundary Beyond the Three Mile Limit* (Recent Statutes, 1939), 39 Col. L. Rev. 317.

Excerpts from official documents and from the views of representative publicists, mostly of the nineteenth century, are collected in Crocker, *The Extent of the Marginal Sea* (1919).

A. DEFINITION OF TERMS

Among writers on the subject of rights to the ocean and its bed, there is often a tendency to use the same words to convey different meanings. It therefore becomes necessary to fix, somewhat arbitrarily, on the import of the terms used in this brief. In doing so, we shall draw, primarily, on the definitions set out in the convention on territorial waters drafted in anticipation of the First Conference on the Codification of International Law, The Hague, 1930.[4] Article 1 of that draft convention provides that "The territorial waters of a state[5] consist of its marginal sea and its inland waters."[6] Article 2 provides that "The marginal sea of a state is that part of the sea within three miles (60 to the degree of longitude at the

[4] The 1930 Hague Conference was called to consider the codification of certain branches of international law including the law of territorial waters. The draft convention referred to above was prepared by a group of American jurists and scholars and the text, together with extensive explanatory comments, were printed in a special supplement to Volume 23 of the American Journal of International Law (1929), under the title "Research in International Law". This work will hereinafter be cited as *Research in International Law*.

[5] The word "state" refers to a member of the family of nations, and not to one of the States of the United States. In referring to one of the latter, this brief will adopt the practice of identifying it by capitalizing the "s", as "State".

[6] *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 249.

equator) of its shore measured outward from the mean low water mark or from the seaward limit of a bay or river-mouth".[7] While the "marginal sea" is sometimes called the "coastal sea", "adjacent sea", or "territorial sea" by writers in the field, the term "adjacent sea" as used in this brief, does not necessarily connote the "marginal sea" as above defined but is used in a more general and less precise sense.

"The inland waters of a state", as defined in Article 3 of the draft convention, "are the waters inside its marginal sea [i. e., landward of mean low-water mark and of the seaward limit of bays and mouths of rivers], as well as the waters within its land territory."[8] Finally, although Article 4 defines the high sea as "that part of the sea out-

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[7] *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 250.

[8] *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 262. The waters "inside the marginal sea" are those "landward of the mean low water-mark and the waters landward of the seaward limit of bays and river-mouths * * *; the 'waters within the land territory' would include the waters of land-locked lakes and the waters of rivers." Comment on Article 3, *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 262. There has been some disagreement over the proper classification of large bays and gulfs, *i. e.* whether they are "inland waters" or whether they are a part of the "marginal sea" or of the "open sea". When they are less than ten miles in width at their entrance, they are generally deemed to be inland waters. But certain "historic bays", like the Delaware, Chesapeake, and Conception bays, are admittedly inland, even though more than ten miles across at their mouth. There has also been some conflict about how lines should be

side marginal seas",[9] the comment on Article 4 recognizes that the term "high sea" is often used to include the marginal sea, and it, together with the term "open sea", is generally so used in this brief.

Since this case has to do with the bed of the marginal sea, it is of great importance that that area be distinguished from the bed of inland waters and from "tidelands"—lands above low-water mark, either adjacent to the open sea or inland waters, which are covered and uncovered by the tides. See *Baer* v. *Moran Bros. Co.*, 153 U. S. 287; cf. *Walker* v. *State Harbor Commissioners*, 17 Wall. 648, 650.

Some reference should also be made to what has been characterized as "distance terminology".[10] The three miles referred to in Article 2

drawn where a number of islands along the coast extend outward several miles from, and somewhat parallel with, the mainland. Since each island is entitled to a marginal belt of three miles, these interlocking belts may enclose a small portion of what would otherwise be a part of the open sea. If these enclosures are not too large, they are generally deemed to be a part of the marginal sea of the adjacent state. See *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 265–274, 275–280; see also Boggs, *Delimitation of the Territorial Sea* (1930), 24 A. J. I. L. 541.

[9] *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 265.

[10] Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. xxxvii. The textual material which follows on this subject is drawn from Jessup, *op. cit. supra*, p. xxxviii, where "distance terminology" is discussed in even greater detail.

of the draft convention, *supra*, p. 17, are "marine" or "nautical" miles, which are the same as "geographic" miles. The marine league is the equivalent of three nautical miles, and the three-mile limit is sometimes stated in terms of one marine league. On the other hand, the nautical mile equals 1.15 English statute miles, and a marine league, therefore, is the equivalent of 3.45 English statute miles. Since the English statute mile, sometimes also referred to as an "English mile" or a "land mile", is the distance commonly referred to as a "mile" in everyday speech (5280 feet), the three-mile limit under international law actually consists of 3.45 miles, as that term is popularly understood.[11]

B. THE DEVELOPMENT OF THE CONCEPT OF THE MARGINAL SEA

A note of caution is a necessary preface to any attempt at an historical survey of the marginal sea concept, and that note has, perhaps, been sounded most plainly by Masterson, *Jurisdiction in Marginal Seas* (1929), pp. xiii–xiv:

> A thorough treatment of the historical development of the law relating to jurisdiction in the marginal seas with respect to

[11] California's Constitution defines its boundaries as extending three *English* miles into the sea. See *supra*, p. 4. Thus its claim does not extend to the entire one marine league marginal sea, being a little less than half an English mile short.

fisheries, neutrality, crime, pilotage, collision, quarantine, salvage, revenue, and customs is beyond the scope of this [survey]. The laws passed to protect or regulate these various interests, or claims, involve different considerations, and they have, therefore, developed along different lines; laws securing or regulating a particular interest have been evolved from factors peculiar to such interest. They, thus, necessarily present distinct questions, and should, therefore, be dealt with separately in a study of the law pertaining to jurisdiction in the littoral seas. The attempt within recent years, on the part of some writers, judges, and governments, to fix a single zone beyond which the application or enforcement of them all is forbidden, thus treating them as a single problem, has cast this extremely difficult subject into hopeless confusion, and has littered the juristic literature on the subject with careless assertion. Such attempts are often veiled efforts to dodge the accurate solution of a perplexing problem. Assertion and hasty generalization have been handed on, copied, and repeated until repetition has led to their acceptance by some as representing statements of a principle of International Law. * * *

We shall attempt, in this introductory section, to put primary emphasis on the history of the theory of proprietary rights in the bed of the marginal sea, discussing other aspects of the mar-

ginal sea concept only when such a discussion seems necessary to keep the basic question in focus.

1. *From the Roman law to the "battle of books."*—Under the Roman law, the sea was regarded as being open to the common use of all men (*res communes*) and incapable of being appropriated (*res nullius*).[11] During the middle ages, this view underwent modification. The Italian republics, notably Venice, and somewhat later other European countries, including England, for purposes of suppressing piracy, securing monopolies over trade and commerce, levying tribute on foreign ships, or reserving exclusive fishing rights, claimed dominion and in various respects exercised exclusive jurisdiction in and over such seas as the Adriatic, Baltic, and English Channel, which were adjacent to their respective coasts.[12] By the end of the sixteenth century, this development had progressed to the point where Spain claimed the exclusive right of navigation in the Pacific Ocean, the Gulf of Mexico, and the West-

[11] A valuable discussion of the Roman law with citations of source materials is contained in Fenn, *Justinian and the Freedom of the Sea* (1925), 19 A. J. I. L. 716.

[12] See Fulton, *The Sovereignty of the Sea* (1911), pp. 3–19; Fenn, *Origins of the Theory of Territorial Waters* (1926), 20 A. J. I. L. 465. Antonius Peregrinus has left a full statement of the Venetian position in a book which he wrote in 1604. He states that the Princes who possessed the sea acquired a property right in it. See Fenn, *The Origin of the Right of Fishery in Territorial Waters* (1926), pp. 224–225.

ern Atlantic, and Portugal asserted a similar right in the Atlantic south of Morocco, and in the Indian Ocean.[14] These and lesser claims were contested by the English and Dutch. However, in the seventeenth century, England, for her part, asserted dominion over portions of the North Sea and over the Bay of Biscay and the Atlantic from the North Cape to Cape Finisterre, as well as over the so-called "narrow seas".[15]

In consequence of all these "vain and extravagant pretensions" long since exploded,[16] there arose in the early part of the seventeenth century the celebrated juridical controversies over the freedom of the seas, the "battle of books".[17] Hugo Grotius, in his *Mare Liberum* (1609) and, with some qualifications, in his *De Jure Belli ac*

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[14] See Fulton, *op. cit. supra*, pp. 4–5; Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 4; Hall, *A Treatise on International Law* (7th Ed., 1917), pp. 146–147.

[15] See Hall, *op. cit. supra*, pp. 144–145; 1 Oppenheim, *International Law* (5th Ed., 1937), p. 462; 1 Halleck, *International Law* (4th Ed., 1908), p. 134. The "narrow seas", according to Oppenheim (pp. 401–402), consisted of St. George's Channel, The Bristol Channel, the Irish Sea and the North Channel. However, the meaning of the phrase apparently varied at different times and according to different authors, and the "narrow seas" were sometimes treated as being identical with the "British Seas". See Fulton, *The Sovereignty of the Sea* (1911), p. 18.

[16] See *The Queen* v. *Keyn*, L. R. 2 Exch. Div. 63, 175 (1876).

[17] The term is Professor Nys'. See Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942), p. 8.

Pacis (1625) urged the view of the Roman law that the sea was incapable of ownership, while John Selden, replying in his *Mare Clausum* (1635), defended the claims of England on the grounds that the sea was not inexhaustible, that it could be appropriated, and that the English Crown, unlike Spain and Portugal, had a good title based on long-standing usage and maintained by sufficient naval strength.[18]

While writers like Thomas Digges (1569), Serjeant Callis (1622), and Sir Thomas Craig (1603), asserted rights of property and jurisdiction in the adjacent sea particularly,[19] others in the late 1500's and early 1600's made reference to the protective purposes of an adjacent sea and their arguments contained, implicitly or explicitly, a statement that the "Prince * * * has not a right of property, of *proprietas*, in the sea".[20] Following Selden, Lord Chief Justice Hale and other English writers on maritime and common law asserted, even as late as the nineteenth century, that the adjoining seas and the soil

[18] See Fulton, *op. cit. supra*, pp. 338, 369–374.

[19] *Id.* at pp. 357, 362–363.

[20] Fenn, *The Origin of the Right of Fishery in Territorial Waters* (1926), p. 120, and pp. 119–122, 127. Compare *id.* at pp. 123–125, 182, 211. However, Fenn points out that the Englishmen Welwood (1590) and Malynes (a contemporary), among others, "championed the claims of their sovereign to ownership of the surrounding water". *Id.* at p. 178.

beneath them belonged to the Crown."[21] But, commencing near the end of the seventeenth century, even sovereign rights in the sea were less often claimed officially and, by the beginning of the nineteenth century, official claims to proprietary rights had almost disappeared.[22] Such proprietary claims as remained were wholly unrelated to any concept of the marginal sea and were, like the ownership of the pearl banks off Ceylon, a good deal more than three miles from land, based merely on ancient occupation and the acquiescence of other nations."[23]

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[21] Hale, *De Jure Maris*, in Hargrave, Francis, *A Collection of Tracts Relative to the Law of England* (1787), vol. 1, pp. 10–17; Blackstone, *Commentaries* (Cooley's 2nd ed., revised), p. 110; 1 Molloy, *De Jure Maritimo et Navali* (9th ed., 1759), pp. 103–107, 124–130; Chitty, *Prerogatives of the Crown* (1820), pp. 142, 173, 206; Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm* (1830), pp. 1–6.

[22] Hall, *A Treatise on International Law* (7th ed. 1917), p. 150; Fulton, *The Sovereignty of the Sea* (1911), pp. 517–525; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 4–5. Elihu Root, in his presentation in the North Atlantic Fisheries Arbitration, stated that (Sen. Doc. No. 870, 61st Cong., 3d Sess., vol. XI, p. 2006): "these vague and unfounded claims [of the eighteenth and earlier centuries] disappeared entirely * * *. The sea became, in general, as free internationally as it was under the Roman law."

[23] See Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 14–16; 1 Westlake, *International Law* (1910), pp. 190–191; Hurst, *Whose is the Bed of the Sea?* 4 British Year Book of International Law (1923–24), pp. 39, 40–41.

2. *The range of cannon.*—The beginning of the eighteenth century marked the development of a theory of an adjacent sea with characteristics different from those attributed to the open sea—a theory which eventually led to the concept of the marginal sea as we know it today. The old extravagant claims "died out and vanished in the lapse of time, without apparently leaving a single juridical or international right behind".[24] And the formulation of the modern, wholly independent, concept, at least as to the width of the area, is usually attributed to the Dutch jurist, Cornelius Van Bynkershoek (1673–1743), whose *De Dominio Maris Dissertatio* appeared in 1702.[25] Bynkershoek, although

[24] See Fulton, *The Sovereignty of the Sea* (1911), p. 538.

[25] The origins of this theory have been traced to the glossators and post-glossators, especially Bartolus (1314–1357), who advocated a maritime jurisdiction extending 100 miles from land, and Gentilis (1440–1508), who asserted dominion as well as jurisdiction to the same extent (Fenn, *Origins of the Theory of Territorial Waters* (1926), 20 A. J. I. L. 465); by the latter half of the seventeenth century, several publicists had declared that the seas near the coast were susceptible of appropriation (Fulton, *The Sovereignty of the Sea* (1911), pp. 539–552), and, on at least three occasions in the seventeenth century, the range of cannon was officially suggested as the extent of a nation's powers. Thus, in 1610, the Dutch, in objecting to King James' prohibition of fishing "in his seas", said that no prince could "challenge further into the sea than he can command with a cannon, except gulfs within their land from one point to another." Fulton, *op. cit. supra*, p. 156. See also the treaties between Great Britain and Spain (1667), and between Belgium and Algiers (1662) referred to *infra*, note 9, p. 136. Pontanus, a Dutchman, who wrote a reply to

supporting the general freedom of the seas advocated by Grotius, took the position, in substance, that the sea could be owned wherever it could be occupied to the exclusion of others, and that, as regards coastal waters, such occupancy should be deemed to extend to the distance of a cannon-shot from shore, since, within that limit, the sea was subject to the domination of the mainland.[26] This view, which he summarized in the famous maxim, "*imperium terrae finiri, ubi finitur armorum potestas*",[27] received wide, but by no means uniform, acceptance among later publicists of the eighteenth and nineteenth centuries, several of whom emphasized the points that dominion over the sea near the coasts was necessary to the safety of the littoral nation, that the riches found in it were not inexhaustible, and that its uses rendered it susceptible of being appropri-

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Selden, advanced a compromise theory in 1637, which theory was based on a distinction between the adjacent sea and the high sea. He argued that the former could be reduced to ownership and exclusive jurisdiction while the latter had to remain free. See Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942), pp. 19–20.

[26] *De Dominio Maris Dissertatio*, translation of 2d edition by Magoffin, *Classics of International Law* (1923), pp. 41–45, 55–57. The introduction to this translation, written by James Brown Scott, points out that Grotius, in his *De Jure Belli ac Pacis*, had conceded that exclusive rights might be acquired in certain portions of the sea bordering the land. But cf. Riesenfeld, *op cit. supra*, pp. 18–19.

[27] Quoted, in this form, from Bynkershoek's later work, *Quaestionum Juris Publici* (1737), p. 59, translation by Frank, *Classics of International Law* (1930), p. 54.

ated.[28] It was left to Galiani, the Italian jurist, in his work, *De' Doveri de' Principi Neutrali*, published in 1782, to propose a fixed measure for the range of cannon and to translate that range into a distance of three miles.[29] This three-mile equivalent was subsequently adopted by other writers.[30]

"The publicists who came after Bynkershoek in the eighteenth century, while usually referring to the cannon-range limit, or adopting it with respect to questions of prize, did not as a rule adhere to it as the sole principle for delimiting the territorial belt."[31] While publicists toward the end of the eighteenth century did come to assert the right of a nation to an interest in the adjacent seas, and some even argued that the adjacent sea had a territorial character, they differed among themselves as to the character of the adjacent sea, the purposes for which it could be treated as attaching to the littoral nation, and its extent.[32] The pre-1789 statutes and constitutions of the

[28] See Vattel, *Le Droit de Gens*, translation by Fenwick of the edition of 1758, *Classics of International Law* (1916), pp. 107–109; Wolff, *Jus Gentium* (1764), translation by Drake, *Classics of International Law* (1934), pp. 72–73.

[29] Fulton, *The Sovereignty of the Sea* (1911), p. 563.

[30] 1 Azuni, *The Maritime Law of Europe*, translation by Johnson (1806), pp. 204–205.

[31] Fulton, *op. cit. supra*, p. 558.

[32] *Id.* at pp. 558–566. The development of the concept of the marginal sea in the late eighteenth century is discussed in more detail, *infra*, pp. 115–139.

original States, as well as the American treaties, statutes, and executive documents of the eighteenth century, reveal no acceptance of the concept of a territorial belt in the adjacent sea. The treaties and decrees of the European nations as well, in this period, did not adopt a theory of ownership in the marginal sea; the most numerous provisions in such public documents were concerned primarily with neutrality zones and rights of capture within certain distances from the coast."[33]

The "general use of the one marine league is in large measure owing to the example, or the pressure, of Great Britain and the United States of America, and perhaps chiefly, if indirectly, to the influence of the latter."[34] In seeking to safeguard the neutrality rights of the United States in the conflict between France and Britain, Thomas Jefferson, as Secretary of State, on November 8, 1793, addressed notes to Mr. Hammond, the British Minister, and to M. Genet, the French Minister. In the first of these notes he stated that it was necessary to fix provisionally on some distance within which "the territorial protection of the United States shall be exercised", and, in both, that "the greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human

[33] See *infra*, pp. 92–142; Fulton, *op. cit. supra*, pp. 566–573.

[34] Fulton, *op. cit. supra*, p. 650; Dickinson, *Jurisdiction at the Maritime Frontier* (1926), 40 Harv. L. Rev. 1, 3.

sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league."[*] The United States thereby became the first power to adopt one sea league as the equivalent of a gunshot from shore; even then, "the three-mile limit was put forward tentatively, and, in a manner, as a temporary expedient", the United States having "found it necessary to define the extent of the line of territorial protection which they claimed on their coast in order to give effect to their neutral rights and duties."[*]

3. *From the nineteenth century to modern times.*—In the years that followed upon the beginning made by the United States in 1793, the concept of the marginal sea enjoyed gradually increasing acceptance. Many of its characteristics are still the subject of debate, however, and we shall trace the development of this acceptance and these doubts in the writings of the publicists, and in the growth of the doctrine in the United States, Great Britain, other countries, and in international law councils.

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[*] Both letters appear in 1 Moore, *International Law Digest* (1906), pp. 702, 704. The letter to Mr. Hammond will also be found in H. Ex. Doc. 324 (42d Cong., 2d Sess.), pp. 553–554, and the letter to M. Genet will be found in Am. State Papers, 1 For. Rel. 183.

[*] Fulton, *op. cit. supra*, p. 573; Conboy, *The Territorial Sea* (1924), 2 Can. Bar Rev. 8, 17.

(a) *The writings of publicists.*—During the nineteenth and twentieth centuries, publicists writing on the subject of rights of the littoral nation in its adjacent seas have engaged in a spirited controversy over the nature of those rights. A number of writers, largely European, have denied the territorial character of the marginal sea, and conceded to the littoral state only certain powers of control, jurisdiction, police and the like, but not sovereignty. The leading exponent of this school of thought was De Lapradelle." But it is the opinion of most publicists that a littoral state enjoys territorial sovereignty, includ-

" An English translation of De Lapradelle's article, *The Right of the State Over the Territorial Sea* (1898), 5 Revue Générale de Droit International Public 264–284, 309–347, appears in Crocker, *The Extent of the Marginal Sea* (1919), pp. 183–236. Other writers disapproving the territorial concept include Calvo, Von Liszt and Nuger; translations from their works are also found in Crocker, *op. cit. supra*, pp. 15–33, 292–294, 299–318. Approximately a dozen such writers in all during the period from 1850 to 1914 are listed by Professor Niemeyer, *Allgemeines Völkerrecht des Küstenmeers* (1926), 36 Niemeyers Zeitschrift für Internationales Recht, pp. 22–24. Cf. 1 Fauchille, *Traité de Droit International Public* (1925), pt. II, p. 128. The Italian writer, Carnazza-Amari, denied that the littoral nation could have proprietary rights in the water of the adjoining sea, but admitted that it could in the "fruits of the submarine soil." See Crocker, *op. cit. supra*, p. 38. An American author who rejects the proprietary concept is Masterson. See his article, *Territorial Waters and International Legislation* (1929), 8 Ore. L. Rev. 309, 340.

722583—47——4

ing ownership, in the three-mile belt and its bed and subsoil."

Sir John Salmond's pozing of the alternatives is as succinct and accurate a summary of the views of the publicists as is available. Writing in 1918, he said:[10]

> * * * It may be that international law recognizes that, for purposes of that law, the exclusive territorial sovereignty of each state includes a belt of marginal waters extending for a marine league or for some other defined distance. It may be, on the other hand, that it recognizes merely a right on the part of each sovereign state to appropriate such marginal waters as part of its

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[9] Professor Niemeyer, in his article published in 1926, named more than 20 publicists who espoused the territorial concept during the period from 1850 to 1914. *Allgemeines Völkerrecht des Küstenmeers*, 36 Niemeyers Zeitschrift für Internationales Recht, pp. 21–22. See also 1 Fauchille, *Traité de Droit International Public* (1925), pt. II, pp. 126–127; Dickinson, *Jurisdiction at the Maritime Frontier* (1926), 40 Harv. L. Rev. 1, 2; 1 Wheaton, *Elements of International Law* 6th ed., 1929), p. 368; Hall, *A Treatise on International Law* (7th ed., 1917), pp. 155–156; 1 Westlake, *International Law* (1910), p. 188; 1 Oppenheim, *International Law* (5th ed., 1937), p. 383; Lawrence, *The Principles of International Law* (7th ed., 1923), pp. 138–140; 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945), pp. 452, 751. Perhaps the outstanding nineteenth century advocates of the ownership theory were Hautefeuille and Pradier-Fodéré, translated excerpts from whose works appear in Crocker, *The Extent of the Marginal Sea* (1919), pp. 103–106, 389–400.

[10] *Territorial Waters* (July, 1918), 34 Law Q. Rev. 235, 238–239.

territory, if it chooses so to do. It may be, alternatively, that it recognizes neither actual territorial sovereignty nor a right of territorial appropriation, but merely a right of jurisdiction and control over such waters falling short of exclusive possession and ownership.

With respect to the extent of the marginal sea, Professor Jessup said, in 1927, that "upon a consideration of all the evidence * * * the three-mile limit is today an established rule of international law."[40] Thomas Baty has remarked that the three-mile rule has been frequently attacked in theory, but that it is "supreme in practice",[41] and Conboy has stated that "by the overwhelming usage and practice of nations the three-mile limit is accepted as the boundary of the Territorial Sea."[42] Equally categorical statements to the opposite effect may be cited, however. According to Judge Boye of the Norwegian Supreme Court, "There is no international usage generally accepted regarding the extent of the territorial waters."[43]

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[40] Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 66.

[41] Baty, *The Three-Mile Limit* (1928), 22 A. J. I. L. 503.

[42] Conboy, *The Territorial Sea* (1924), 2 Can. Bar. Rev. 8, 18.

[43] Quoted in 3 Gidel, *Le Droit International Public de la Mer* (1934), p. 124, as follows: "Il n'y a pas d'usage international généralement reconnu concernant la limite de eaux territoriales." Cf. Meyer, *Extent of Jurisdiction in Coastal Waters* (1937), p. 3, ("no generally accepted rule").

Gidel's conclusions are probably as penetrating as those of any of the publicists in this field. He is of the opinion that the three mile limit "is a rule of international law in a negative sense, *i. e.*, that no state can refuse to respect the zone of territorial waters established by another state when the width of that zone does not exceed three miles".[44]

(b) *The development of the concept in the United States.*—In this country, the territorial concept of the marginal sea has been espoused by jurists since the time of Marshall and Story. The earliest opinions of interest are those delivered by Chief Justice Marshall in *Church* v. *Hubbart*, 2 Cranch 187 (1804), and Mr. Justice Story in *The Ann*, 1 Gall. 62, 1 Fed. Cas. No. 397 (C. C. D. Mass., 1812). Although these cases involved the enforcement of laws of the littoral nation within the three-mile limit, and not proprietary rights, the marginal sea was characterized in both cases as "territory". 2 Cranch at 234; 1 Gall. at p. 63, 1 Fed. Cas. at p. 927. And the territorial concept of the marginal sea has been recognized more recently by this Court. Thus, in *Cunard S. S. Co.* v. *Mellon*,[45] Mr. Justice Van Devanter said (262 U. S. at 122–123):

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[44] "D'autre part la limite de trois milles est plus qu'une simple coutume particulière liant un groupe d'Etats: elle est une règle du droit international, mais à contenu négatif, c'est-à-dire, qu'aucun Etat ne peut se refuser à respecter la zone d'eaux territoriales établie par un autre Etat lorsque la largeur de cette zone n'excède pas trois milles." 3 Gidel, *Le Droit International Public de la Mer* (1934), p. 134.

[45] 262 U. S. 100.

> Various meanings are sought to be attributed to the term "territory" in the phrase "the United States and all territory subject to the jurisdiction thereof." We are of opinion that it means the regional areas—of land and adjacent waters—over which the United States claims and exercises *dominion* and *control* as a *sovereign* power. * * *
>
> It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a *marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.* [Italics supplied.]

This Court's acceptance of the territorial concept has, of course, been reflected in the opinions of the lower courts.[*] But there have, nevertheless, been a few instances in which the courts have

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[*] See *Humboldt Lumber Manufacturers' Ass'n* v. *Christopherson*, 73 Fed. 239, 244–245 (C. C. A. 9, 1896); *United States* v. *Newark Meadows Imp. Co.*, 173 Fed. 426, 429 (C. C. S. D. N. Y., 1909); *Gillam* v. *United States*, 27 F. 2d 296, 299 (C. C. A. 4, 1928), certiorari denied, 278 U. S. 635; *Dunham* v. *Lamphere*, 3 Gray (69 Mass.) 268, 269–270 (1855); *Boone* v. *Kingsbury*, 206 Cal. 148 (1928), appeal dismissed and certiorari denied, 280 U. S. 517; *Commonwealth* v. *Boston Terminal Co.*, 185 Mass. 281, 282 (1904); *Lipscomb* v. *Gialourakis*, 101 Fla. 1130, 1134 (1931); *People ex rel. Mexican Telegraph Co.* v. *State Tax Commission*, 219 App. Div. (N. Y.) 401, 410 (1927); *State ex rel. Luketa* v. *Pollock*, 136 Wash. 25, 29 (1925).

inclined toward a contrary view."[47] Several of the State courts which have adopted the territorial concept have also recognized ownership of the sea and the lands thereunder within the three-mile limit, and some have, erroneously, we think, attributed that ownership to the States. This Court, however, appears never to have expressly determined proprietary rights in the marginal sea and its bed."[48]

While a few of the States, beginning in the second half of the nineteenth century, adopted statutes or constitutional provisions extending their boundaries into the marginal sea,[49] there is

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[47] See *Hogg* v. *Beerman*, 41 Ohio St. 81, 95 (1884); *The Hungaria*, 41 Fed. 109 (D. S. C. 1889).

[48] In *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 87, this Court held that the waters and submerged lands adjacent to the Annette Islands were the property of the United States and were included within an Indian Reservation. This decision is put by Hackworth at the head of his section dealing with the character of the marginal sea. 1 *Digest of International Law* (1940), p. 623. However, in view of the fact that the waters adjacent to the Annette Islands appear to be bays, straits, or arms of the sea, and of the fact that the Court's opinion does not mention the three-mile limit or cite authorities pertinent to the question, it is believed that the decision is probably not relevant here. But see *Alaska Gold Recov. Co.* v. *Northern M. & T. Co.*, 7 Alaska 386, 398, in which the district court declared that lands beneath the Bering Sea, valuable for gold mining, belonged to the United State as part of the public domain.

[49] See Ireland, *Marginal Seas Around the States* (1940), 2 La. L. Rev. 252–293, 436–478; Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942), pp. 257–259. Louisiana and Florida, and possibly Texas, have claimed maritime boundaries extending more than one marine league into the sea. *Id.* at pp. 258–259.

no federal statute which specifically provides that the marginal sea or its bed is territory of the United States. There are, however, several federal statutes, having to do with the hunting of fur seals and oil pollution of waters, which use the phrase "territorial waters of the United States", or its equivalent, in such a context as to indicate that the reference is to waters other than inland.[50] Of interest also are regulations issued under Title II of the National Prohibition Act, 41 Stat. 305, which include a "marginal belt of the sea extending from low-water mark outward a marine league, or 3 geographical miles," as within the "territorial waters of the United States."[51]

The executive branch of this Government has, with but few exceptions,[52] affirmed the doctrine of a zone of sovereignty extending three miles into the sea. During the Civil War, Secretary of State Seward wrote the following in a note to Secretary Welles:[53]

[50] See Section 8 of the Act of April 21, 1910, 36 Stat. 326, 328; Section 2 of the Act of June 7, 1924, 43 Stat. 604, 605, 33 U. S. C. 432 (c); Section 9 of the Act of August 24, 1912, 37 Stat. 499, 501; cf. Section 3 of the Act of June 15, 1917, 40 Stat. 217, 220 (espionage).

[51] Reprinted in *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 250.

[52] See Riesenfeld, *Protection of Coastal Fisheries Under International Law* (1942), pp. 251–256.

[53] 1 Moore, *International Law Digest* (1906), p. 705. For other diplomatic correspondence on this subject, see 1 Wharton, *International Law Digest* (2d ed., 1887), pp. 100–109.

> This Government adheres to, recognizes, and insists upon the principle that the maritime jurisdiction of any nation covers a full marine league from its coast * * *.

In a note addressed to Tassara, the Spanish Minister, Secretary of State Seward, in 1862, criticized any attempt of the nations to extend their jurisdiction with the development of more powerful cannon. Such an extension, he said, would unduly interfere with the freedom of the seas. Moreover—

> * * * it must always be a matter of uncertainty and dispute at what point the force of arms exerted on the coast can actually reach. The publicists rather advanced towards than reached a solution when they laid down the rule that the limit of the force is the range of a cannon-ball. The range of a cannon-ball is shorter or longer according to the circumstances of projection, and it must be always liable to change with the improvements of the science of ordnance. Such uncertainty upon a point of jurisdiction or sovereignty would be productive of many and endless controversies and conflicts. A more practical limit of national jurisdiction upon the seas was indispensably necessary, and this was found, as the undersigned thinks, in fixing the limit at three miles from the coast.[54]

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[54] 1 Moore, *International Law Digest* (1906, pp. 706, 707. Charles Cheney Hyde, in his work entitled, *International Law Chiefly as Interpreted and Applied by the United*

In 1886, Secretary of State Bayard, in a letter to Secretary Manning, declared that "the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark."[34]

However, in 1896, Secretary of State Olney indicated to the Netherland Minister that[35]—

> This Government would not be indisposed, should a sufficient number of maritime powers concur in the proposition, to take part in an endeavor to reach an accord having the force and effect of international law as well as of conventional regulation, by which the territorial jurisdiction of a State, bounded by the high seas, should henceforth extend *6 nautical miles* from low-water mark, and at the same time providing that this *six-mile limit* shall also be that of the neutral maritime zone.
>
> I am unable, however, to express the views of this Government upon the sub-

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States, similarly opposes the continued application of Bynkershoek's original doctrine. Its extension with the ever-increasing range of modern guns would result in an indefinite standard, good today and obsolete tomorrow. See Vol. I, secs. 141, 145 (1945 ed., pp. 451–455, 464–467). The Naval War College has also pointed out that any extension of the three-mile zone "carries obligations as well as rights", and correspondingly reduces the area of the high seas. *International Law Topics and Discussions* (1913), p. 33.

[34] 1 Wharton, *Digest of International Law* (1886), p. 107.

[35] Quoted in Crocker, *Extent of the Marginal Sea* (1919), p. 679.

ject more precisely at the present time, in view of the important consideration to be given to the question of the effect of such a modification of existing international and conventional law upon the jurisdictional boundaries of adjacent States and the application of existing treaties in respect to the doctrine of headlands and bays.

But in an address in 1924, Secretary of State Charles E. Hughes summarized the American doctrine in these words:[11]

> The Government of the United States has repeatedly asserted that the limits of territorial waters extend to three marine miles outward from the coast line. This has been asserted by our Government in making claims upon other Governments. * * *
>
> * * * * * *
>
> It is quite apparent that this Government is not in a position to maintain that its territorial waters extend beyond the three-mile limit and in order to avoid liability to other governments, it is important that in the enforcement of the laws of the United States this limit should be appropriately recognized. * * *

To avoid such liability, the United States entered into a series of "liquor treaties" with a number of countries, in which it was agreed that the United States could engage in anti-smug-

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[11] Hughes, *Recent Questions and Negotiations* (1924), 18 A. J. I. L. 229, 230-231.

gling activities beyond the three-mile limit. However, in the treaties with Great Britain, Cuba, Germany, the Netherlands, Panama, and Japan, the following reservation was made:[38]

> The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.

This provision is to be contrasted with that found in ten other liquor treaties, in which the parties stipulated that they "retain their rights and claims, without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction".[39]

A provision having more direct reference to proprietary rights in the bed of the marginal sea is Article II of the Isthmian Canal Convention of 1904, in which the United States was granted "the use, occupation and control of" the Panama Canal Zone, including the "land under water" extending three marine miles from

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[38] 43 Stat. (Part 2) 1761; 44 Stat. (Part 2) 2395; 43 Stat. (Part 2) 1815; 44 Stat. (Part 2) 2013; 43 Stat. (Part 2) 1875; 46 Stat. (Part 2) 2446. See *Cook* v. *United States*, 288 U. S. 102.

[39] See Ireland, *Marginal Seas Around the States* (1940), 2 La. L. Rev. 252, 278. See, *e. g.*, treaties with France, 45 Stat. (Part 2) 2403; Norway, 43 Stat. (Part 2) 1772; Denmark, 43 Stat. (Part 2) 1809; Italy, 43 Stat. (Part 2) 1844; Greece, 45 Stat. (Part 2) 2736.

mean low-water mark in the Caribbean and Pacific. 33 Stat. (Part 2) 2234–2235.

The most recent action of the executive department that is relevant to this survey is President Truman's Proclamation No. 2667, of September 28, 1945, announcing that the "United States regards the natural resources of the subsoil and sea bed of the continental shelf" beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."

"As to the extent of the continental shelf, see *infra*, note 16, pp. 79–80.

" 10 F. R. 12303. The text of this proclamation is as follows:

"Whereas the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

"Whereas its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

"Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

"Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus

This proclamation, in asserting rights in the sea bed of the continental shelf, lays claim to natural resources for many miles beyond the three-mile limit.

(c) *The development of the concept in Great Britain.*—The first English judge to adopt the three-mile rule, and then only as a belt of neutral-

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naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources:

"Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

"Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

* * * * * *

By Executive Order 9633 of the same date (10 F. R. 12305), the resources of the continental shelf were placed under the jurisdiction and control of the Secretary of the Interior "for administrative purposes, pending the enactment of legislation in regard thereto."

ity, was Sir William Scott (Lord Stowell) in his decision in *The Twee Gebroeders*, 3 C. Rob. 162, 163, 165 Eng. Rep. 422 (High Court of Admiralty, 1800).[82] This case, and one which followed shortly thereafter,[83] "furnished the legal precedents which regulated subsequent practice."[84] While Britain has rather consistently insisted upon the observance by other nations of the three-mile limit and has, indeed, more or less abided by that limit itself,[85] it did, for a long time, take care to avoid committing itself to three miles as a maximum, and seemed to be invoking the old cannon-range rule as, perhaps, affording a basis for rights beyond three miles.[86] In 1928, however, the British Government observed that "No claim is made by His Majesty's Government in Great Britain to exercise rights over the high seas outside the belt of territorial waters," but reserved its rights to certain sedentary fisheries outside of the three-mile limit.[87]

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[82] See Riesenfeld, *Protection of Coastal Fisheries Under International Law* (1942), pp. 134–135.

[83] *The Anna*, 5 C. Rob. 373, 165 Eng. Rep. 809 (High Court of Admiralty, 1805).

[84] Fulton, *The Sovereignty of the Sea* (1911), p. 579.

[85] See Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 10–12.

[86] See Fulton, *op. cit. supra*, pp. 592–593; Riesenfeld, *op. cit. supra*, pp. 154–156.

[87] Letter of December 6, 1928, directed to the Preparatory Committee for the Conference for the Codification of International Law, quoted in Riesenfeld, *op. cit. supra*, p. 166.

The English decisions and statutes since the eighteenth century furnish considerable material related to the problem of proprietary rights in the marginal sea. Of the greatest interest in this connection are (1) an arbitration proceeding which led to the enactment of the Cornwall Submarine Mines Act of 1858,[68] (2) the decision in *The Queen* v. *Keyn*, L. R. 2 Exch. Div. 63 (1876), often referred to as the *Franconia* decision, (3) the Territorial Waters Jurisdiction Act of 1878,[69] which was enacted as a result of the *Franconia* decision, and (4) the case of the *Attorney-General for British Columbia* v. *Attorney-General for Canada*,[70] decided by the Judicial Committee of the Privy Council in 1913, together with the decision of the Privy Council, three years later, in *Secretary of State for India* v. *Chelikani Rama Rao*.[71]

Lord Hurst gives the following account of the origin of the Cornwall Submarine Mines Act:[72]

> A dispute had broken out between the Crown and the Duchy of Cornwall as to the ownership of minerals won from workings lying beneath the water on the coast of Cornwall. The dispute covered minerals obtained from workings (a) between high-

[68] 21 & 22 Vict., c. 109.
[69] 41 & 42 Vict., c. 73, sec. 7.
[70] [1914] A. C. 153.
[71] L. R. 43 Ind. App. 192 (1916).
[72] Hurst, *Whose is the Bed of the Sea?* (1923-24), 4 British Year Book of International Law, pp. 34-35.

and low-water mark, (b) below low-water mark in tidal rivers and estuaries, and (c) below low-water mark in the open sea. Lord Cranworth, then Lord Chancellor, and Lord Kingsdown, then Chancellor of the Duchy, agreed to refer the question to the arbitration of Sir John Patteson, one of the judges of the Court of Queen's Bench, and Sir John Patteson decided that the right to all mines and minerals lying under the seashore between high- and low-water mark and under estuaries and tidal rivers below low-water mark in the County of Cornwall was vested in the Prince of Wales "as part of the soil and territorial possessions of the Duchy of Cornwall," and that the right to all mines and minerals lying below low-water mark under the open sea adjacent to the County of Cornwall but not forming part of it was vested in Her Majesty the Queen "in right of Her Crown." Sir John Patteson also recommended that effect should be given to his award by legislation, and accordingly the Bill was introduced which in due course became law as the Cornwall Submarine Mines Act, 1858.

This Act provided that:[78]

> All mines and minerals lying below low-water mark under the open sea adjacent to

[78] The circumstances of its adoption are also described in the opinions of Lord Coleridge and Lord Chief Justice Cockburn in *The Queen* v. *Keyn*, L. R. 2 Exch. Div. at 155–158, 199–202.

but not being part of the County of Cornwall are, as between the Queen's Majesty, in right of her Crown, on the one hand, and His Royal Highness Albert Edward Prince of Wales and Duke of Cornwall, in the right of his Duchy of Cornwall, on the other hand, vested in Her Majesty the Queen in right of her Crown as part of the soil and territorial possessions of the Crown.

Despite these provisions, much doubt was cast upon the right of the Crown to the bed of the sea below low-water mark in Lord Chief Justice Cockburn's opinion in *The Queen* v. *Keyn*, L. R. 2 Exch. Div. 63 (1876), in which the question was whether the Central Criminal Court had jurisdiction to try a foreigner for an offense committed on a foreign ship within the three-mile limit off the coast of England. Although the ruling that that court lacked jurisdiction may not have required a decision on the territorial limits of England, Lord Cockburn's opinion nevertheless took pains to express his doubt that the territory of England extended beyond the low-water mark." He said that "beyond low-water mark the bed of the sea might, I should have thought, be said to be unappropriated, and, if capable of being appropriated, would become the property of the first occupier." L. R. 2 Exch. Div. at 198–199.

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[14] See Salmond, *Territorial Waters* (1918), 34 Law Q. Rev. 235, 242.

The decision in the *Keyn* case led to the enactment of the Territorial Waters Jurisdiction Act, which provided, in substance, that all offenses committed "within the territorial waters of Her Majesty's dominions" were within the jurisdiction of the Admiral; that the quoted phrase meant such part of the sea adjacent to the coast "as is deemed by international law to be within the territorial sovereignty of Her Majesty;" and that, for purposes of the Act, it included "any part of the open sea within one marine league of the coast measured from low-water mark." 41 & 42 Vict., c. 73.

A dispute between British Columbia and the Dominion Government over fishery rights off the coast of British Columbia led to the decision of the Privy Council in *Attorney-General for British Columbia* v. *Attorney-General for Canada* [1914] A. C. 153. While holding that the Provincial Legislature could not grant exclusive fishery rights along her coasts, and that their lordships were "relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low water mark to what is known as the three-mile limit because they are of opinion that the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land",

the Council, per Viscount Haldane, went on to say that ([1914] A. C. at 174–175):

> * * * the three-mile limit is something very different from the "narrow seas" limit discussed by the older authorities, such as Selden and Hale, a principle which ma safely be said to be now obsolete. Th doctrine of the zone comprised in the former limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters. Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a Conference, it is not desirable that any municipal tribunal should pronounce on it. It is not improbable that in connection with the subject of trawling the topic may be examined at such a Conference. Until then the conflict of judicial opinion which arose in *Reg.* v. *Keyn* is not likely to be satisfactorily settled, nor is a conclusion likely to be reached on the question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes. The obscurity of the whole topic is made plain in the judgment

of Cockburn C. J. in that case. But apart from these difficulties, there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone.

However, three years later, the Privy Council answered the question it had refused to answer in the earlier case, and held that islands that rose in the sea within three miles of British territory are property of the Crown because the bed of the sea within three miles of the coast is the property of the Crown. *Secretary of the State for India* v. *Chelikani Rama Rao*, L. R. 43 Ind. App. 192 (1916). Language to the same effect may be found in the opinions in several other nineteenth and twentieth century cases.[75]

(d) *The development of the concept in other nations.*—No nation today asserts a claim to a narrower belt than three miles.[76] Subject to the

[75] *Attorney-General* v. *Chambers*, 4 de G. M. & G. 206, 213 (1854); *Lord Advocate* v. *Wemyss*, [1900] A. C. 48, 66; *Lord Advocate* v. *Clyde Navigation Trustees*, 19 Rettie 174, 177 (1891); *Lord Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139, 166; *Gammell* v. *Commissioners of Woods and Forests*, 3 MacQueen 419, 457 (1859). The territorial concept was recognized by other judges in *The Leda*, Swa. Adm. 40 (1856); *The Free Fishers* and *Dredgers of Whitstable* v. *Gann*, 11 C. B. (N. S.) 387, 413 (1861); *General Iron Screw Collier Co.* v. *Schurmanns*, 1 John & Hem. 180, 193 (1860).

[76] Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 18–49, 62–63; Fulton, *Sovereignty of the Sea* (1911), pp. 576–603, 650–681; *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 250, *et seq.*; (1930) 24 A. J. I. L. Supp. 253–257.

common right of navigation, each state accedes to the others territorial sovereignty over a marginal belt extending from the coast outward a marine league or three geographic miles."[77] In other words, a three-mile zone, generally speaking, seems to be a universally recognized territorial minimum. Some nations have insisted upon a marginal sea of four miles or more.[78] But the majority of the nations have been unwilling to concede the existence of sovereignty over a belt wider than three miles, although several nations, especially for limited purposes, have often asserted jurisdictional rights over a wider zone.[79] Several nations have supported the three-mile territorial doctrine, on the express condition that they be permitted to exercise certain preventive or protective rights in a contiguous or adjacent zone for a limited number of purposes: *e. g.*, for the enforcement of

[77] In addition to the authorities cited in the preceding footnote, see 1 Hyde, *International Law*, secs. 141–143; 1 Oppenheim, *International Law* (5th ed. 1937), pp. 384–385; 3 Gidel, *Le Droit International Public de la Mer* (1934), pp. 23–61.

[78] The Scandinavian countries, in particular, have generally favored a four-mile zone, but Denmark, in 1874, elected to enforce only a three-mile zone as against non-Scandinavian countries, and Norway, in 1918, instructed her naval officers not to fire on belligerent ships operating beyond the three-mile limit. Spain and several Latin-American countries, Rumania and Turkey, and certain post-World War I countries, like Latvia and Yugoslavia, have favored a six-mile zone. Italy and Portugal have claimed a ten and twelve-mile maritime zone. Kalijarvi, *Scandinavian Claims to Jurisdiction over Territorial Waters* (1932), 26 A. J. I. L. 57–69.

[79] See authorities cited in the two preceding footnotes.

customs laws, for the safeguarding of neutral rights, etc.[80]

The laws of Argentina, Chile, Ecuador, Guatemala, and El Salvador, are perhaps most directly in point on the question of proprietorship. The civil codes of the first four named of these countries, and Article 2 of the Law of Navigation and Marine of the Republic of El Salvador, provide that the adjacent sea, to the extent of one marine league measured from the line of lowest tide, is territorial sea and part of the national domain, or is of "national ownership."[81] The law of Mexico

[80] See particularly: 1 Oppenheim, *International Law* (5th ed. 1937), pp. 384–385; 24 A. J. I. L. Supp. (1930) 253–257; 3 Gidel, *Le Droit International Public de la Mer* (1934), pp. 361–492; Fraser, *The Extent and Delimitation of Territorial Waters* (1926), 11 Corn. L. Q. 455; Wickersham, *Codification of International Law* (1926), 11 Corn. L. Q. 439–452.

[81] Argentina, Codigo Civil (1944), Art. 2.340; Chile, Codigo Civil (1945), Art. 593; Ecuador, Codigo Civil (1930), Art. 582; Guatemala, Codigo Civil (1937), Art. 419. Translations of the articles containing these provisions, taken from earlier editions of the respective codes, appear in *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 257. The El Salvador provision (Codificacion de Leyes Patrias (1879), p. 343) is reprinted in Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), p. 49. See also the provisions in Article 153 of the Honduran Constitution of 1936 that "to the State appertains the full dominion, inalienable and imprescriptible, over the waters of the territorial seas to a distance of twelve Kilometers from the lowest tide marks * * *." 1 Hackworth, *Digest of International Law* (1940), p. 633.

also treats as national property the territorial sea to the limits fixed by international law.[82]

(e) *The concept in international councils.*—While there are earlier instances of international conferences on the subject of fisheries and neutrality rights at which the participating powers agreed to establish a three-mile limit to the special rights of the littoral nation,[83] there does not seem to have been any major attempt to define the general rights of a littoral nation in the adjacent sea until 1894. In that year, the Institute of International Law adopted a set of rules, the first article of which reads as follows:[84]

> ARTICLE 1. The State has a right of sovereignty over a zone of the sea washing the coast, subject to the right of innocent passage reserved in Article 5.
>
> This zone bears the name of territorial sea.

Surprisingly, in Article 2, the Institute provided:[85]

> ART. 2. The territorial sea extends 6 marine miles (60 to a degree of latitude) from the low-water mark along the full extent of the coasts.

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[82] *Ley de Aguas de Propriedad Nacional, Diario Oficial*, August 31, 1934, Art. 1, p. 1235.

[83] Fulton, *Sovereignty of the Sea* (1911), pp. 604–649; Jessup, *op. cit. supra*, p. 61; see Crocker, *Extent of the Marginal Sea* (1919), p. 487.

[84] See Crocker, *op. cit. supra*, p. 148.

[85] *Ibid.*

> Such sovereign rights shall include rights over the air above the said sea and the soil and subsoil beneath it.

and (Article 11):

> In virtue of its sovereign rights over the territorial sea, the riparian State shall exercise for itself and for its nationals the sole right of taking possession of the riches of the sea, the bottom and the subsoil.

The replies of the nations, including the United States, to which the draft convention was communicated, indicated general agreement with these provisions.[91]

At the conference for the Codification of International Law at The Hague in 1930, at which the United States was officially represented (46 Stat. 146), there was similar agreement that "international law attributes to each Coastal State sovereignty over a belt of sea round its coasts," that "the belt of territorial sea forms part of the territory of the State," and that "the sovereignty which the State exercises over this belt does not differ in kind from the authority exercised over its land domain."[92] The draft Con-

[91] League of Nations Document, c. 74, M. 39, 1929 V., reprinted in part in 24 A. J. I. L. Supp. (1930), pp. 26–27.

[92] Publications of the League of Nations, V. Legal Questions, 1930, V. 9, reprinted in 24 A. J. I. L. Supp. (1930) 234. See also Hudson, *The First Conference for the Codification of International Law* (1930), 24 A. J. I. L. 447, 455–458; Reeves, *The Codification of the Law of Territorial Waters* (1930), 24 A. J. I. L. 486, *et seq.*; Miller, *The Hague Codification Conference* (1930), 24 A. J. I. L. 674, 686–693.

vention provisionally approved by the delegates provided that (Article I):[93]

> The territory of a State includes a belt of sea described in this Convention as the territorial sea.

and (Article II):

> The territory of a Coastal State includes also the air space above the territorial sea, as well as the bed of the sea, and the subsoil.

According to one commentator, the drafting committee "sought to leave the authority of the littoral state over the bed of the territorial sea and its subsoil without limitation."[94]

However, the League's Codification Conference failed to agree on the width of the zone to be included in the territory of the adjacent state and on other basic questions so that no final code resulted.[95]

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[93] Publications of the League of Nations, V. Legal Questions, 1930, V. 7, reprinted in 24 A. J. I. L. Supp. (1930) 184–188. The draft convention prepared by the Research in International Law (see *supra*, note 4, p. 17), provided that the territorial waters of a state consist of its marginal sea and its inland waters (Art. 1), and that "The sovereignty of a state extends to the outer limit of its marginal seas" (Art. 13). *Research in International Law*, 23 A. J. I. L. (Spec. Supp.) 243, 244; see Comments, *id.* at pp. 249–250, 288–295.

[94] Reeves, *op. cit. supra*, p. 490.

[95] Riesenfeld, *Protection of Coastal Fisheries Under International Law* (1942), p. 124.

The most extended adjacent sea of modern times was that claimed by the Ministers of Foreign Affairs of the American Republics at the beginning of the recent war. At their Panama meeting in October, 1939, the ministers adopted the Declaration of Panama, creating a security zone averaging 300 miles around the American continent, except Canada and European colonies and possessions. Within this zone, the American Republics claimed "as of inherent right entitled to * * * [be] free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air." [96]

II

THE UNITED STATES ACQUIRED THE TERRITORY COMPRISING CALIFORNIA FROM MEXICO AND IT HAS NEVER GRANTED THE LANDS IN THE MARGINAL SEA TO THE STATE

A. THE ORIGINAL ACQUISITION OF CALIFORNIA FROM MEXICO

The conquest of California by the United States is regarded as having been completed on July 7, 1846. *Beard* v. *Federy,* 3 Wall. 478, 490; *Merryman* v. *Bourne,* 9 Wall. 592, 601. The Treaty of Guadalupe Hidalgo ending the war with Mexico and defining the boundary between

[96] See Riesenfeld, *op. cit. supra,* p. 119. The text of the Declaration is printed in 1 Dept. of State Bulletin (1939), 321, and in 34 A. J. I. L. Supp. (1940), 17–18.

the two countries was signed on February 2, 1848, and proclaimed on July 4, 1848 (9 Stat. 922). The Treaty, by the boundary description (Art. V), ceded Upper California to the United States. Under Article VIII, as well as under familiar principles of international law, the title to property privately owned by Mexicans did not pass to the United States, but was saved in the private owners.[97] However, none of the submerged lands here involved falls within that category. It is undisputed that the United States acquired complete rights in the submerged lands from Mexico: indeed the State's principal claim to these lands is based upon that assumption, for the State contends further that these rights subsequently passed from the United States to the State upon its admission to the Union.

It is the Government's position, on the other hand, that the rights in the marginal sea never did pass from the United States. Upon admission to the Union, California did not succeed to the property rights of the United States within its borders, except to the extent that such property rights were transferred to it by the United States. As to the submerged lands within the three-mile belt, however, it is undisputed that the United States has not by statute or other-

[97] *San Francisco* v. *Le Roy*, 138 U. S. 656, 671; *Knight* v. *United States Land Ass'n*, 142 U. S. 161, 183–184; *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 487; *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 15.

wise made any express conveyance. And the Government contends that there has not been any implied conveyance. The State's position, in substance, is that a conveyance must be implied from the Act of 1850 under which California was admitted to the Union.

B. CALIFORNIA'S ADMISSION TO THE UNION

California, never an organized territory of the United States, was admitted to statehood on September 9, 1850 (9 Stat. 452). Prior thereto, in 1849, without authorization by Congress, but with the support of the Governor of California appointed by the Secretary of War, the people of California had adopted a State Constitution, Article XII of which defined the boundaries of the State.[88] For undisclosed reasons, the western boundary was described as extending "three English miles" into the Pacific Ocean and as including "all the islands, harbors, and bays along and adjacent to the Pacific Coast."[89] Such

[88] See Goodwin, *The Establishment of State Government in California* (1914). The Constitution of 1849 appears in Cal. Stat. (1850), pp. 24–36.

[89] The report of the proceedings of the convention which framed the State Constitution shows that the articles which were proposed with respect to boundaries described the western boundary variously as extending "one marine league" into the Pacific, "along the coast" of the Pacific, "to the Pacific," and "three English miles" into the Pacific. Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution* (1850), pp. 123–124, 167, 169, 200, 417, 431–432, 437, 440, 443, 454. But unlike

boundary has been retained to the present date notwithstanding that it is nearly one-half mile nearer shore than is the marine league or 3 marine miles limit of the United States (Cal. Const. of 1879, Art. XXI, Sec. 1).[1]

The Constitution contained no provision with respect to the ownership of the lands or waters within the State, other than a general provision continuing all "rights, prosecutions, claims, and contracts" and all laws not inconsistent with the Constitution (1849 Const., Art. XII, Sec. 1; 1879 Const., Art. XXII, Sec. 1).

The Act of Congress admitting California, after reciting that her Constitution was found to be republican in its form of government, contains the usual provision that the State was admitted "on an equal footing with the original States in all respects whatever" (9 Stat. 452). For purposes of this case we may assume that the Act, in addition, impliedly approved the boundaries of the State, although not mentioning them. But it contains no grant of land or water to the State

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the eastern boundary, the western boundary was not controversial and the report contains no debate with respect to it, except that one delegate to the convention objected to a proposed article describing the western boundary as proceeding "along the coast" of the Pacific on the ground that "It is usual to have a water line to which the jurisdiction of the State shall extend." *Ibid*, p. 199.

[1] For a discussion of the difference between an English mile, on the one hand, and a marine or nautical mile, on the other hand, see *supra*, pp. 19–20.

or to any other grantee. On the contrary, in Section 3 it specifies that the State is admitted upon the condition, *inter alia,* that it

> shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; * * *.

Accordingly, if the question were an original one, it would be supposed not only that the Act did not grant any lands, including submerged lands, owned by the United States, but that Congress expressed an intent and, in effect, provided that the title to all such lands be reserved in the United States. However, prior decisions with respect to general legislation involving the disposition of "public lands" appear to hold that the term "public lands" does not include tidelands. *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 17; *Mann* v. *Tacoma Land Co.,* 153 U. S. 273, 284; *Newhall* v. *Sanger,* 92 U. S. 761, 763. There are no decisions of this Court extending that interpretation to the statutory provision here involved as applied to the three-mile belt, and it may be doubted whether such extension should be made since the rule of those decisions does not appear to have any support in the legislative history of the foregoing statutory provision. Indeed such meager materials as are available with respect to the

1850 act admitting California seem to point to the contrary conclusion.[3]

In any event, assuming that the Act did not affirmatively reserve the title of the United States here involved, it is none the less evident that it did not grant it. There is certainly no express grant, and the only provision suggested as the basis for an implied grant is the "equal footing" clause. But it should be noted at the very outset that, as a general rule, grants of public property, whether to a State or person, must be expressed in clear and explicit language. *United States* v. *Arre-*

[3] The bill which became the Act of Admission (S. 169, 31st Cong., 1st Sess.) was reported by Senator Stephen A. Douglas, of the Committee on Territories, on March 25, 1850 (21 Cong. Globe 592). On April 23, 1850, Senator Douglas offered a committee amendment which introduced the provision in question (21 Cong. Globe 798). On May 8, 1850, Henry Clay submitted to the Senate a Report of the Committee of Thirteen, "to whom were referred various resolutions relating to California." (S. Rep. No. 123, 31st Cong., 1st Sess., 21 Cong. Globe 944). In this report there appears the following:

"A majority of the committee, therefore, recommend to the Senate the passage of the bill reported by the Committee on Territories for the admission of California as a State into the Union. To prevent misconception, the committee also recommend that the amendment reported by the same committee to the bill be adopted, so as to leave incontestable the right of the United States to the public domain *and other public property* in California." [Italics supplied.]

Thus the report speaks of public domain and *other* public property, a descriptive term so sweeping as to include submerged lands owned by the United States.

dondo, 6 Pet. 691, 738; *Leavenworth, L. & G. R. Co.* v. *United States,* 92 U. S. 733, 740; *Larson* v. *South Dakota,* 278 U. S. 429, 435; *Reichelderfer* v. *Quinn,* 287 U. S. 315, 321; *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 272. And it is indisputably settled that the equal footing clause does not constitute a *general* grant of property rights, for, although the new States were admitted on an equal footing with the original States, the United States retained ownership of all dry lands, islands, and non-navigable inland waters not specifically granted. *Oklahoma* v. *Texas,* 258 U. S. 574, 591; *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 87; *United States* v. *Utah,* 283 U. S. 64, 75; *United States* v. *Oregon,* 295 U. S. 1, 14. It was immaterial that the original States may have owned extensive areas of dry lands, islands, or lands under non-navigable inland waters; the equal footing clause was never employed to award such lands to the new States, and such lands have remained the property of the United States. The vast area of national forest within California is an example of property owned by the United States which it continued to own after California became a State, notwithstanding that the original States may have owned comparable areas within their borders. And there are collected in the footnote references to a variety of situations in which Congress affirmatively authorized grants of specified

areas to the State.[3] In each of these situations the basic assumption was that the property rights of the United States in the areas involved remained in the United States even after the admission of the new State, until such time as the United States made other disposition of such lands. It is undisputed that Congress has never expressly authorized any such grant with respect to the three-mile belt, and the only statutory authority suggested by the State as the basis for a grant is the equal footing clause in the Act of Admission. But the equality called for by the equal footing clause was a governmental or polit-

[3] LANDS FOR INTERNAL IMPROVEMENTS (including roads, railways, bridges, canals, etc.): Act of September 4, 1841 (5 Stat. 453, 455, 43 U. S. C. 857), applicable to each new State admitted.

SWAMP LANDS: Act of September 28, 1850 (9 Stat. 519–520, 43 U. S. C. 982 ff.).

SCHOOL LANDS, UNIVERSITY LANDS, LANDS FOR PUBLIC BUILDINGS: Act of March 3, 1853 (10 Stat. 244, 246, 248).

LANDS FOR AGRICULTURE AND MECHANIC ARTS COLLEGES: Act of July 2, 1862 (12 Stat. 503–505, 7 U. S. C. 301–308).

DESERT LANDS (Carey Act): Act of August 18, 1894 (28 Stat. 422, 43 U. S. C. 641).

LANDS FOR CALIFORNIA PARKS: Acts of June 29, 1936 (49 Stat. 2026; 49 Stat. 2027).

See also the Act of July 23, 1866 (14 Stat. 218, 43 U. S. C. 865, 987), confirming to California any selections made pursuant to land grants theretofore made to the State by any Act of Congress. Of the six statutes listed above, the third and sixth are specifically limited to California; the four remaining statutes are general in scope, but are equally applicable to California.

ical equality and not an equality in property ownership.

There is, however, a line of decisions holding that the ownership of tidelands and lands under inland navigable waters is so closely related to State sovereignty that the equal footing clause must be construed to grant such lands to the new States in order to achieve the equality between the old and the new States required by the statute. It is the Government's position that those cases determined only the ownership of the tidelands and lands under the inland waters; that there are crucial differences between such lands and the lands under the three-mile belt here involved; and that there is no reason here to depart from the general rule that the equal footing clause did not transfer property of the United States to the State. These differences will be discussed in detail in Point III. And if the equal footing clause did not transfer the rights of the United States to the State, it is clear that those rights remain in the United States. Title could not have passed by prescription since there is no such right against the United States.[4] *Jourdan* v. *Barrett,* 4 How. 168, 184; *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *Morrow* v. *Whitney,* 95 U. S. 551, 557; *Hays* v. *United States,* 175 U. S. 248, 260; *Northern Pac. Ry. Co.* v. *McComas,* 250 U. S. 387, 391. See also discussion, *infra,* pp. 216–217.

[4] The State's attempt to invoke an estoppel or some similar doctrine will be dealt with at length in Point IV.

III

THE RIGHTS OF THE UNITED STATES IN THE MARGINAL SEA DID NOT PASS TO THE STATE. THE DECISIONS OF THIS COURT HOLDING THAT THE TIDELANDS AND THE BEDS OF INLAND NAVIGABLE WATERS PASSED TO THE NEW STATES UNDER THE EQUAL FOOTING RULE HAVE NO APPLICATION TO LANDS IN THE MARGINAL SEA

Introductory.—The rule of the tidelands and inland waters cases. In 1842, this Court decided *Martin* v. *Waddell,* 16 Pet. 367, the first of the series of cases of present concern. It was an action of ejectment, involving the title to an oyster bed in a bay and river of one of the original States, New Jersey. The plaintiffs claimed title to lands in Raritan Bay and River under mesne conveyances from the Proprietors of East Jersey whose title was in turn derived from the King of England through the Duke of York. The defendants claimed under an exclusive right or license granted pursuant to a statute of the State of New Jersey. The Court, in ruling in favor of the defendants, employed the following reasoning to defeat the earlier claims that were traced through the Proprietors: Under the law of England the rights in "rivers, bays and arms of the sea" (referred to categorically as "navigable waters") were associated with the powers of government, and passed from the King to the Duke only "as a part of the prerogative rights annexed to the political powers conferred on the duke", and not as "private property to be parcelled out and sold to individuals" (16 Pet. at 411);

consequently, the Proprietors who claimed through the Duke had no property rights in these lands which could be the subject of *private* conveyance; and when the Proprietors subsequently surrendered all their governmental powers and authorities to the Crown in 1702, the rights of the Crown in these lands again became complete in all respects. Thereafter, at the time of the Revolution "when the people of New Jersey took possession of the reins of government, and * * * the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became * * * vested in the state." (16 Pet. at 416.) Accordingly, the rights of the Crown in the "rivers, bays, and arms of the sea" passed to the State of New Jersey which had authority to issue the exclusive license under which the defendants claimed.

Several years later, in *Pollard's Lessee* v. *Hagan,* 3 How. 212, the Court was faced for the first time with the problem of deciding the ownership of tidelands or lands under inland navigable waters in one of the subsequently admitted States. The lands involved were tidelands bordering the Mobile River in Alabama. The plaintiffs claimed under a patent issued by the United States. The lands in question were part of the territory which Georgia had ceded to the United States in 1802 for the purpose of creating new States. In ruling against the plaintiffs, the Court stressed the fact

that under the terms of the deed of cession from Georgia, the United States was to hold the territory in trust for the new States to be formed (3 How. 220–223). An additional ground apparently was that the title to the tidelands was an attribute of State sovereignty which Alabama acquired by virtue of her admission on an "equal footing"[8] with the original States (3 How. 229).

Thereupon, with *Martin* v. *Waddell* and *Pollard's Lessee* v. *Hagan* as basic guides, there followed a series of decisions in which the Court applied the theory that upon the Revolution the original States succeeded to the rights of the Crown in the tidelands and navigable waters; that such rights of ownership constituted one of the indicia of State sovereignty; and that the admission of new States upon an "equal footing" with the original States required the transfer of such lands to the new States as an incident of sovereignty. Thus, the rule has been recognized

[8] The equal footing provision apparently stems from a resolution of Congress passed on October 10, 1780, providing that new States should be formed in such territories as might be ceded to the United States by the original States and that such new States should have the "same rights of sovereignty, freedom and independence, as the other states". 6 *Journals of Congress*, 146–147. Similar provisions, adopting the "equal footing" phrase, were embodied in some of the early deeds of cession by the original States and in the Ordinance of 1787 for the government of the northwest Territory (1 Stat. 51, 53), as appears from the opinion in *Pollard's Lessee* v. *Hagan*, 3 How. at 221–222.

or applied with respect to tidelands,[6] bays and harbors,[7] navigable rivers,[8] and lakes.[9]

However, none of these cases involved the ownership of lands under the open sea within the three-mile belt, and it is the Government's position that there are no decisions of this Court adjudicating the ownership of such lands.[10]

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[6] *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Goodtitle* v. *Kibbe*, 9 How. 471; *Mumford* v. *Wardwell*, 6 Wall. 423; *Shively* v. *Bowlby*, 152 U. S. 1; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273; *Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479; *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56; *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10. All of these cases, however, involved tidelands along bays, harbors, and rivers. None of them involved tidelands along the open sea.

[7] *Martin* v. *Waddell*, 16 Pet. 367; *Smith* v. *Maryland*, 18 How. 71; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *United States* v. *Mission Rock Co.*, 189 U. S. 391. See also *Knight* v. *U. S. Land Association*, 142 U. S. 161, 183.

[8] *Den* v. *Jersey Company*, 15 How. 426; *Barney* v. *Keokuk*, 94 U. S. 324; *McCready* v. *Virginia*, 94 U. S. 391; *United States* v. *Utah*, 283 U. S. 64. See also *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68; *Packer* v. *Bird*, 137 U. S. 661, 666–667; *Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 359–362; *Scott* v. *Lattig*, 227 U. S. 229, 242–243; *Donnelly* v. *United States*, 228 U. S. 243, 260; *United States* v *Chandler-Dunbar Co.*, 229 U. S. 53, 60–61.

[9] *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387; *McGilvra* v. *Ross*, 215 U. S. 70; *United States* v. *Holt Bank*, 270 U. S. 49; *Massachusetts* v. *New York*, 271 U. S. 65. See also *Hardin* v. *Jordan*, 140 U. S. 371, 381–382; *Hardin* v. *Shedd*, 190 U. S. 508, 519; *United States* v. *Oregon*, 295 U. S. 1, 14.

[10] Several cases have come before the Court in which the marginal sea may have been involved. But in none of them was there any adjudication of property rights therein. These cases will be considered in detail, *infra*, pp. 153–163.

There is, to be sure, a decision by the Supreme Court of California in which the so-called tideland rule seems to have

Moreover, it is the Government's position that the foregoing cases dealing with ownership of tidelands and lands under inland navigable waters should have no application to lands under the marginal sea for the following reasons:

(A) If ownership of submerged lands is an attribute of sovereignty, the ownership of lands in the marginal sea is an attribute of *national* sovereignty, not of State sovereignty. The three-mile belt is a creature of international law and such governmental rights and powers as are related thereto are derived through the national government as one of the family of nations. Accordingly, there is no basis for implying a grant to the new States under the equal footing clause. The equal footing rule contemplates that the new States shall have the same incidents of *State* sovereignty as are enjoyed by the original States. But the dominant sovereignty here is the national sovereignty, and it would be wholly inconsistent

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been applied to lands in the marginal sea. *Boone* v. *Kingsbury*, 206 Cal. 148, 170, 180–181, appeal dismissed and certiorari denied *sub nom. Workman* v. *Boone*, 280 U. S. 517. But this Court has never decided the question, and, in any event, both parties in that case assumed and did not contest California's alleged title to the lands involved. In addition to the *Boone* case, the courts of a few other States seem to have assumed in dicta that the individual States own the marginal sea. *Commonwealth* v. *Boston Terminal Co.*, 185 Mass. 281, 282 (1904); *Lipscomb* v. *Gialourakis*, 101 Fla. 1130, 1134 (1931); *People ex rel. Mexican Telegraph Co.* v. *State Tax Commission*, 219 App. Div. (N. Y.) 401, 410 (1927); *State ex rel. Luketa* v. *Pollock*, 136 Wash. 25, 29 (1925).

with the theory of the equal footing rule to take these lands away from the national sovereign by an implied grant on the ground that sovereignty and ownership go hand in hand. See *infra*, pp 72–91.

(B) A second reason why the tidelands and inland waters decisions are inapplicable is that the individual original States made no claim whatever on the marginal sea at the time of the formation of the Union. Consequently, there is no basis whatever for the operation of the equal footing rule which at most merely undertakes to achieve an equality of rights as between the old and the new States. See *infra*, pp. 92–142.

(C) Finally, the Government submits that ownership of submerged lands is not an attribute of sovereignty at all within the meaning of the equal footing clause. The contrary rule with respect to the tidelands and inland waters is believed to be erroneous, but the Government does not ask that it be overruled; the Government suggests merely that the unsound rule be not extended to the marginal sea. See *infra*, pp. 143–153.

A. OWNERSHIP OF THE MARGINAL SEA, IF AN ATTRIBUTE OF SOVEREIGNTY, IS PRIMARILY AN ATTRIBUTE OF THE SOVEREIGNTY OF THE NATIONAL GOVERNMENT RATHER THAN THAT OF THE STATE

The equal footing rule can have no application to the three-mile belt, if, as we shall undertake to show, the ownership of the marginal sea is predominantly an attribute of sovereignty of the

national government rather than that of the local governments. It must be remembered that there has been no express grant of the marginal sea by the United States, and that resort to the equal footing clause is only for the purpose of implying a grant where none otherwise exists. To be sure, the equal footing clause has been construed as a grant with respect to tidelands and inland waters on the theory that property rights in those areas were an incident of State sovereignty and that Congress intended the new States to have the same sovereign rights as those enjoyed by the original States. But if ownership of the three-mile belt is an attribute of national sovereignty (assuming it to be an attribute of some sovereignty),[11] it would require a distortion of Congressional purpose to convert the equal footing clause into a grant of the lands involved herein. Every consideration would point towards an intention to retain these lands, and certainly there would be no basis whatever for imputing an intention to part with them. The presumption would be against any intention of Congress to sever the title from the sovereignty of the United States to which it was annexed. Cf. *Massachusetts* v. *New York*, 271 U. S. 65, 89; *United States* v. *Oregon*, 295 U. S. 1, 14.

[11] Of course, if ownership were not an attribute of sovereignty at all, see *infra*, pp. 143–153, there would be no room whatever for the operation of the equal footing doctrine.

We turn therefore to the question whether the ownership of the marginal sea, assuming it to be an attribute of sovereignty, is an attribute of sovereignty of the United States rather than of the individual States. And we shall consider the question first in relation to international law, and secondly from the point of view of the distribution of powers, under the Constitution, between the United States and the individual States.

1. *The nature of sovereignty in the marginal sea in the light of international law.* To be sure, the Constitution, not international law, is determinative of rights as between the States and the United States. But principles of international law, as of common law, may be of weight in construing the Constitution and in ascertaining the powers and rights of the United States which are to be implied from those plainly enumerated. See *Jones* v. *United States,* 137 U. S. 202, 212; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 707–711; *United States* v. *Wong Kim Ark,* 169 U. S. 649, 666–667.[12] This would seem especially true in cases involving rights in the three-mile belt. For the three-mile belt is, so to speak, a creature of international law. *Attorney-General for British Columbia* v. *Attorney-General for Canada,* [1914] A. C. 153,

[12] See also, Wright, *Conflicts of International Law With National Laws and Ordinances* (1917), 11 A. J. I. L. 1; *International Law In Its Relation To Constitutional Law* (1923), 17 A. J. I. L. 234.

174; *The Queen* v. *Keyn,* L. R. 2 Exch. Div. 63, 204 (1876); and see the discussion in Point I, *supra,* pp. 20–58, and in Point III B, *infra,* pp. 115–142. The theory of the marginal sea was conceived and developed by publicists in the field of international law (*supra,* pp. 22–34; *infra,* pp. 116–121). Later, by a gradual process, through treaties and usage it became a part of international law as a limitation upon the principle of the freedom of the seas, which is a matter of national and international, as distinct from State, concern. Concurrently, the theory was adopted by the United States in its capacity as a member of the family of nations and in the course of conducting its *external* affairs. See *supra,* pp. 37–43; *infra,* pp. 128–135.

Accordingly, in the absence of any domestic reason requiring a different result, it would seem that such sovereign rights and powers as are related to the three-mile belt should be attributed to the sovereign through which they are derived by international law. That sovereign, of course, is the national sovereign, and in this country, since the American Revolution, national sovereignty, with "all the attributes" thereof (*Burnet* v. *Brooks,* 288 U. S. 378, 396; *Ruppert* v. *Caffey,* 251 U. S. 264, 301), has been vested exclusively in the United States. *Penhallow* v. *Doane,* 3 Dall. 54, 80–81; *Legal Tender Cases,* 12 Wall. 457, 555; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 331–332; *United States* v.

Belmont, 301 U. S. 324, 331–332. See Story, *The Constitution*, 5th Ed., Vol. 2, p. 473.

Thus, in discussing the powers of the Federal Government in respect to external affairs, this Court stated in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. at pp. 316–317:

> * * * since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states * * *.
>
> As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. * * * When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.

And the opinion placed reliance upon the famous statement by Rufus King (p. 317):

> The states were not "sovereigns" in the sense contended for by some. They did not

> possess the peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war. 5 Elliott's Debates, 212.

See also Fiske, *The Critical Period of American History* (1916 ed.), p. 90.

As shown more fully elsewhere herein (pp. 37–43, 128–135), the marginal sea, including that bordering the original States, was annexed to this country, not through any action by the individual States, but through action of the Federal Government in the conduct of our international affairs. Indeed, several of the original States never have claimed the marginal sea as being within their boundaries, and none did so until after its territorial character and extent had been determined by the United States. See *infra*, pp. 98–102, 141. Even if they had claimed it, their claims probably would have been ineffective as against foreign nations, unless sponsored by the United States. For "the states, individually, were not known nor recognised as sovereign, by foreign nations" (*Penhallow* v.

Doane, 3 Dall. 54, 81), the powers of external sovereignty having "passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 316.

The historical relationship between the marginal sea and the external powers and interests of the United States has been continued throughout the years. This is evidenced by the numerous instances in which the executive branch of the Federal Government, in conducting our external affairs, has had occasion to reconsider the status of the marginal sea, particularly its extent, in relation to questions which have arisen as between the United States and foreign nations.[18] That such instances will continue to occur seems certain, especially since, notwithstanding the concern of the United States to maintain the principle of the freedom of the seas, there exist strong reasons for extending the exercise of jurisdiction

[18] Many of these instances are cited in Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 49–57, 181–182, 220–222; 1 Moore, *International Law Digest* (1906), pp. 702, 714, 716–721; Wharton, *International Law Digest* (2d. ed.), Vol. I, pp. 100–109, Vol. II, p. 57; 1 Hackworth, *Digest of International Law* (1940), pp. 634–641; *Research in International Law* 23 A. J. I. L. (Spec. Supp), pp. 343–348.

beyond the three-mile limit.[14] If in any of these instances in the exercise of its external powers the national government should decide to disclaim the marginal sea as territory or, as would be more likely, to enlarge its width, it could do so "without regard to state laws or policies" (*United States* v. *Belmont,* 301 U. S. 324, 331–332).

Indeed, the implications of such action by the national government are dramatically suggested by the recent action of the executive branch in announcing to the world that the continental shelf adjacent to our shores is territory appertaining to the United States.[15] The continental shelf consists of a vast area extending many miles beyond the three-mile limit.[16] Although this ac-

[14] See Jessup, *op. cit., supra,* pp. 19–20, 64–65, 445, 462; Allen, *Control of Fisheries Beyond Three Miles* (1939), 14 Wash. L. Rev. 91; Loret, *Louisiana's Twenty-Seven Mile Maritime Belt* (1939), 13 Tul. L. Rev. 252; 1 Kent, *Commentaries on American Law,* 14th Ed., pp. 33–40; Schücking, memorandum as Reporter of the Second Sub-Committee of the Committee of Experts for the Progressive Codification of International Law, 20 A. J. I. L., Spec. Supp. (July, 1926), 63, 77–79. See also the "Declaration of Panama", *supra,* p. 58.

[15] Ex. Order 9633, 10 F. R. 12305; Ex. Proclamation 2667, 10 F. R. 12303. See *supra,* pp. 42–43.

[16] The "continental shelf" is the name applied to the gradually sloping submarine plain adjacent to practically all of the shore lines of the oceans, extending from low-water mark to a depth of 100 fathoms. Beyond this point there is usually a sharp descent to the abyssal depths of the ocean floor. Cleland, *Geology, Physical and Historical* (1929), pp. 194–

tion does not extend the three-mile limit, it does assert the right of this country to the natural resources that are within the continental shelf beyond the three-mile limit.

Notwithstanding the fact that the proclamation and executive order do not undertake to assert the rights of the Federal Government against the individual States,[10a] it nevertheless seems clear that the claim to those resources was voiced by the national government for the benefit of all the people of this country, not merely for those in the adjacent States.

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195. The width of the shelf is variable, being from 50 to 100 miles along the border of eastern North America. Brigham, *A Textbook of Geology* (1901), p. 287. Along the unsteady Pacific coast of North America, the width of the shelf is subject to marked variations, being in some places less than 10 miles wide. Longwell, Knopf and Flint, *Outlines of Physical Geology* (2nd ed., 1941), p. 182. The greatest width in that area appears to be south of Point Conception, California, where the shoreline turns eastward. The maximum width, measured from the shore to the bottom of the steep descent, is approximately 168 miles off Long Beach. Lawson, *The Continental Shelf, Off the Coast of California* (Bulletin, National Research Council, No. 44, Vol. 8, pt. 2, April 1924), p. 4.

[10a] Executive Order 9633, 10 Fed. Reg. 12305, placed the natural resources of the subsoil and sea bed of the continental shelf under the jurisdiction of the Secretary of Interior for administrative purposes, pending the enactment of legislation in regard thereto, and provided that:

"* * * Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit."

The three-mile belt itself is the result of similar action by the national government. It did not, of course, become a reality through a single proclamation or executive order, but it was the product of a course of action in international affairs sponsored by the national government. And when rights in the three-mile belt finally emerged, they emerged as rights of all the people of this country, not merely those in the coastal States.

Another circumstance, fortuitous perhaps, serves to highlight the ownership of the marginal sea as an attribute of national rather than local sovereignty. As previously indicated, pp. 4, 20, 60–61, the Constitution of California fixes its western boundary in the Pacific Ocean as three *English* miles from the low-water mark, whereas the outer boundary of the United States is three *nautical* miles from the low-water mark, a difference of approximately .45 miles. Thus, there is a narrow strip of territory in the Pacific Ocean adjacent to California, .45 miles wide, that is not within the State of California but is within the United States. Certainly, the United States owns the bed of the ocean within that narrow strip, and we know of no claim thereto that the State has ever made. That ownership stems not only from the original cession of California by Mexico, but also from the position of the United States as a member of the family of nations in which a marginal sea of three nautical miles is recognized as part

of the territory of the adjacent sovereign. The ownership of that .45 mile strip is therefore an attribute of national sovereignty. But, under international law, the three-mile belt does not consist of two zones; it is a single belt, throughout the entire area of which the same rights and powers are recognized. Those rights and powers are derived through the national sovereign, and the ownership of the bed of the marginal sea is accordingly an attribute of national rather than State sovereignty.

2. *The nature of sovereignty in the marginal sea in the light of the framework of government established by the Constitution.* We have endeavored to show above that the ownership of the marginal sea is predominantly an attribute of national sovereignty since all rights and powers in the marginal sea are derived from international law claims asserted by the national government as a member of the family of nations, and are thus related to the external powers of sovereignty which are committed exclusively under our Constitution to the national government. That conclusion is reinforced by an examination of the distribution of powers under the Constitution between the States and the Federal Government in relation to the grounds upon which the theory of the marginal sea is justified, including the functions served by it. These grounds are, in substance, that since the marginal sea is susceptible of continuous control and occupation and

is not inexhaustible, it should be treated as territory of the littoral nation for the purpose of safeguarding the security of the coasts and safety of the nation, protecting and advancing commerce, controlling immigration, enforcing customs and revenue laws, and sustaining the population.[17] As to each of these grounds, the interests and powers of the Federal Government, to the extent that they are not exclusive, are indisputably paramount.

Clearly this is true with respect to the first and most important of the purposes deemed to be served by the marginal sea, namely, the protection of the security of the coasts.[18] The Constitution was adopted, as appears from the preamble, partly "in Order to * * * insure domestic Tranquility" and to "provide for the common defence." Obligating the United States to protect the States from invasion (Art. IV, Sec. 4), it empowers Congress, *inter alia,* to provide for the common defense, to raise and support armies, to

[17] See 1 Moore, *International Law Digest* (1906), pp. 698–699; Latour, *La Mer Territoriale* (1899), p. 7, translated in Crocker, *The Extent of the Marginal Sea* (1919), p. 237. See also *supra*, pp. 27–28.

[18] The originators and chief proponents of the theory of the marginal sea considered the ability to control the use of the marginal sea and the need to protect the landed territory as the theory's chief justifications. This is particularly evident from the writings of Bynkershoek and subsequent publicists who accepted his suggestion that the proper extent of the marginal sea was the distance of a cannon-shot from land, later put at three marine miles.

provide and maintain a navy, to provide for calling forth the militia to repel invasions, to declare war, to make rules concerning captures, and to define and punish piracies and felonies committed on the high seas and offenses against the law of nations (Art. I, Sec. 8). It provides that the President is the Commander in Chief of the army and navy and of the militia when called into the service of the United States (Art. II, Sec. 2). In addition, it prohibits the States from keeping troops or ships of war in time of peace (Art. I, Sec. 10). Thus, only the Federal Government has adequate power to exercise exclusive occupation of the marginal sea and to protect the security of the coasts. It was for the purpose of insuring such security and preserving our neutrality that Thomas Jefferson, as Secretary of State, took steps in 1793 to prohibit hostilities, especially captures, within cannon-shot of the shore. See *supra,* pp. 29–30; *infra,* pp. 130–133.

The interests and powers of the Federal Government likewise are supreme with respect to the protection and advancement of commerce and the enforcement of customs and revenue laws, objects which the theory of the marginal sea promotes by according the littoral nation the right to regulate navigation and to exercise surveillance of ships on the open sea near its coasts. The commercial, fiscal, and political interests which pertain to these objects were major reasons

for the adoption of the Constitution, and Congress was given broad powers to develop and protect them.[19] These powers include, apart from those enumerated above, the power to regulate commerce with foreign nations and among the several States (Art. I, Sec. 8), which embraces the power to control navigation in all its aspects;[20] the power to establish uniform rules of naturalization (*id.*); the power to lay and collect duties and imposts (*id.*), which power was explicitly denied to the States except in so far as Congress might consent to its exercise (Art. I, Sec. 10; see *Brown* v. *Maryland*, 12 Wheat. 419); and the power to make all laws necessary and proper for executing these and all other powers conferred by the Constitution (Art. I, Sec. 8). The wide exercise of these powers in the marginal sea, as well as in the harbors and inland navigable waters, is familiar

[19] See *The Federalist*, Nos. II–IV, IX, XI–XIV. The surveillance of ships in the marginal sea furthers the political, as well as the commercial and fiscal interests, of the nation in that it is a means of protection not only against armed forces, but also against the infiltration, *inter alia*, of undesirable aliens and diseases. Cf. *Church* v. *Hubbart*, 2 Cranch 187, 234; *The Chinese Exclusion Case*, 130 U. S. 581, 606; *Turner* v. *Williams*, 194 U. S. 279, 290; *United States* v. *New York S. S. Co.*, 269 U. S. 304, 313; see also Jefferson's letter of May 15, 1793, to Mr. Ternant, 1 Am. State Papers, For. Rel., 148, 3 Wharton, *International Law Digest* (1886), p. 546.

[20] *Gibbons* v. *Ogden*, 9 Wheat. 1; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Lord* v. *Steamship Co.*, 102 U. S. 541, 544; *Scranton* v. *Wheeler*, 179 U. S. 141; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

history. The Government has considered the regulation and surveillance of foreign ships near our shores to be so necessary to the proper enforcement of customs and revenue laws that, for such purposes, ever since the Act of August 4, 1790 (1 Stat. 145, 157, 158, 164, 175) and the establishment of the Revenue Cutter Service, which in 1915 was succeeded by the Coast Guard (38 Stat. 800), it has asserted the rights of boarding and searching and of preventing the unloading of such ships anywhere within 12 miles of the coast.[21] And under the Anti-Smuggling Act,

[21] See Act of March 2, 1799 (1 Stat. 627, 648, 668); U. S. Rev. Stat. (1874) §§ 2760, 2867, 2868, 3067; Tariff Act of 1922 (42 Stat. 858, 979, 980, 981); Tariff Act of 1930 (46 Stat. 590, 747). Prior to the Tariff Act of 1922, except by virtue of treaty provisions, the statutory authority to board and search was limited to inbound vessels; and there was no provision for the seizure of foreign vessels beyond the three-mile limit. See *Cook* v. *United States*, 288 U. S. 102, 112–113. Under the "Prohibition Treaties," for purposes of preventing the illegal importation of alcoholic beverages, the twelve-mile limit of customs waters was changed to the distance which "can be traversed in one hour by the vessel suspected of endeavoring to commit the offense." See 43 Stat. 1761, 1762; *Cook* v. *United States*, *supra;* Hughes, *Recent Questions and Negotiations* (1924), 18 A. J. I. L. 229; Dickinson, *Rum Ship Seizures Under the Recent Treaties (1926)*, and *Treaties for the Prevention of Smuggling* (1926), 20 A. J. I. L. 111, 340; Dickinson, *Jurisdiction at the Maritime Frontier* (1926), 40 Harv. L. Rev. 1.

The history and numerous functions of the Coast Guard are reviewed in the concurring opinion of Mr. Justice Brandeis and Mr. Justice Holmes in *Maul* v. *United States*, 274 U. S. 501, 512–531.

the President may designate "customs-enforcement" areas extending an additional 50 miles within which foreign as well as domestic ships may be searched or seized."

With respect to the sustenance of the population, which is the last of the aforementioned purposes served by treating the three-mile belt as territorial, the interests and powers of the United States are likewise paramount. Thus, the exclusive right to take the fish found in the waters bordering the littoral nation is, for its full enjoyment, largely dependent upon the powers of the United States. Under the Constitution, only the Federal Government possesses adequate naval powers and facilities to protect the adjacent sea from encroachment by foreign fishermen, and only it may enter into agreements with other nations regulating the use of fisheries (Art. I, secs. 8, 10). Several such agreements applicable to coastal waters have been concluded in the past, the earliest of them antedating the Constitution."

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[22] 49 Stat. 517, 19 U. S. C. 1701.

[23] Article IX of the Treaty of 1778 with France bound the parties not to fish in the "havens, bays, creeks, roads, coasts or places" held by the other. 8 Stat. 12, 16. By the Convention of 1818 with Great Britain, the United States renounced any right to fish within three marine miles of the coasts of Britain's possessions in North America, excepting in specified regions, thus for the first time formally recognizing that limit for purposes of exclusive fishing rights (8 Stat. 248–249). See Fulton, *The Sovereignty of the Sea* (1911), p. 581. The reciprocity treaty of 1854 and the treaty

That additional such agreements will be necessary in the future for the preservation of our most important fisheries seems inevitable in view of modern methods of commercial exploitation and in view of the fact noted by the California Bureau of Commercial Fisheries that "The fisherman, the fish, and the ocean currents pay little attention to these lines" of territorial waters.[24] Indeed, for some years it has been apparent that the police powers of the States are inadequate, and that the Federal Government must use its treaty-making and commerce powers more extensively, as it has done with respect to the halibut fishery in the Pacific.[25]

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of 1871 with Great Britain granted British subjects the right to fish, except for shellfish, along the seacoasts and shores of the United States on the east coast north of the parallels of 36° and 39°, respectively, and United States citizens a similar right in the waters bordering certain of Great Britain's North American territories (10 Stat. 1089–1090; 17 Stat. 863, 869–870). The Convention of 1937, 50 Stat., Pt. 2, 1351, with Canada regulates the halibut fisheries in the western territorial waters of the two countries off the west coast, as well as on the high seas, its provisions being referred to in the Northern Pacific Halibut Act of 1937, 50 Stat. 325, 16 U. S. C. 772.

[24] Division of Fish and Game of California, Fish Bulletin No. 15, The Commercial Fish Catch of California for the Years 1926 and 1927, p. 9.

[25] The Northern Pacific Halibut Act of 1937, 50 Stat. 325, 16 U. S. C. sec. 772. See Daggett, *The Regulation of Maritime Fisheries by Treaty* (1934), 28 A. J. I. L. 693; Jessup, *The Pacific Coast Fisheries* (1939), 33 A. J. I. L. 129; Allen, *Control of Fisheries Beyond Three Miles* (1939), 14 Wash. Law Rev. 91. Compare the Migratory Bird Treaty Act, 16 U. S. C. 703–711; *Missouri* v. *Holland*, 252 U. S. 416, 435.

We do not argue that the effective exercise of the foregoing powers granted to the Federal Government by the Constitution would be impossible without ownership of the bed of the marginal sea. We do insist, however, that it is these sovereign powers, rather than the sovereign powers of the State, to which ownership should be attributed, if it is to be attributed to sovereignty at all.

It seems plain from the foregoing considerations that the ownership of the marginal sea, if an attribute of sovereignty at all, is an attribute of national sovereignty and that therefore the equal footing decisions are inapplicable. To the possible argument that while the Federal Government has strong interests as regards bays, harbors and other inland navigable waters, yet for purposes of the tideland rule this Court has attributed the ownership of them to the sovereignty of the States (*supra*, pp. 69–70), there are several conclusive answers. In the first place, rights in the marginal sea are derived exclusively from the position of the national sovereign in international affairs. It was the national government that sponsored the theory of the three-mile belt, and it was only through its efforts as a member of the family of nations that rights in the marginal sea were derived and finally established. Accordingly, even assuming that the title to the beds of the inland waters was properly attributed to

the sovereignty of the States, a different result should be reached with respect to the marginal sea since the powers and incidents of external sovereignty are vested exclusively in the United States.[26]

Secondly, apart from the international law aspect, even if local features are otherwise balanced against the national features, it seems clear from previous discussion (pp. 74–89) that the three-mile belt bears a far closer relation to national affairs than do the tidelands and the inland waters.

Nor is there anything strange or novel about such a distinction. The same distinction has been drawn in England and other countries, which have recognized the predominantly local interests in the tidelands as opposed to the predominantly national interests in the marginal sea.

Thus the controversy between the Crown and the Duchy of Cornwall as to the ownership of minerals in the submerged lands adjacent to the coast of Cornwall was resolved in precisely this

[26] To be sure, the assumption was made in *Martin* v. *Waddell*, 16 Pet. 367, 410, 416 (involving a bay and river) and repeated in some subsequent cases that the original States succeeded to all sovereign rights of the King. However, it has been firmly settled that rights and powers pertaining to external sovereignty passed directly from the King, not to the several colonies or States, but to the United States. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316, and other cases, *supra*, pp. 75–77. And neither in *Martin* v. *Waddell* nor in any of the subsequent cases did the Court pass upon the character of the sovereignty involved in connection with the ownership of the bed of the marginal sea.

manner. The dispute had been referred to an arbitrator (Sir John Patteson, one of the judges of the Court of the Queen's Bench), who decided that the right to all mines and minerals lying under the sea-shore, between high and low water mark belong to the Prince of Wales as part of the territorial possessions of the Duchy, but that the mines and minerals below the low-water mark under the open sea were vested in the Crown. (*Supra*, pp. 45–46.) Thereafter, effect was given to that determination by Parliament in the Cornwall Submarine Mines Act of 1858 (21 & 22 Vict., c. 109). The distinction thus adopted in England was recognized in the Comment to the Draft Convention on the Law of Territorial Waters which was prepared in anticipation of this country's participation in the 1930 Hague Conference on the Codification of International Law, and the Comment also pointed out that similar provisions have been adopted by other countries. See *Research in International Law*, 23 A. J. I. L. (Spec. Supp.), p. 291. Cf. Farnham, *Waters and Water Rights* (1904), p. 175.[27]

[27] Compare the situation in Canada where there is no uniformity of treatment of the various types of navigable waters. Under the British North America Act, 1867, the ownership of "public harbours" was vested in the Dominion, while the ownership of rivers and lakes has been held to be vested in the Provinces. See *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces*, [1898] A. C. 700, 710–711.

B. THE THIRTEEN ORIGINAL STATES DID NOT OWN THE BED OF THE MARGINAL SEA; THERE IS, THEREFORE, NO BASIS FOR THE OPERATION OF THE "EQUAL-FOOTING" THEORY

The requirement that new States be admitted to the Union on an "equal footing" with the original States was designed to ensure to the new States such sovereign rights as were possessed by the original States. See *supra*, pp. 65–66, 69. If all of the latter did not own the bed of the marginal sea at the time of the formation of the Union, the "equal footing" provision could not operate to deprive the United States of the property rights here involved, and the inland water cases would be, for that reason alone, inapposite. To invoke the "equal-footing" doctrine, it would not be sufficient to find that some, but not all, of the original States owned the soil under the three-mile belt; for to attribute ownership to California by virtue of the ownership of only some of the original States, would put California on better than an equal footing.

In establishing the proposition that the original States had no ownership of lands under the open sea and within three nautical miles of the low-water mark, we shall first discuss the question from the point of view of municipal or local law, and show: (1) that it was not until after the admission of California that any of the original States even claimed that its boundary or property included lands under the ocean; (2) that no basis for the claim is to be found in the Crown

charters and grants to the Colonies which became the thirteen original States, especially when these granting instruments are read in the light of the boundary descriptions in the Definitive Treaty of Peace with Great Britain in 1783; and (3) that the common-law authorities of the period do not stand in the way of the conclusion that the original States had no rights of property in the bed of the marginal sea. Finally, inquiry will be made into the question from the point of view of international law, and it will be demonstrated that the territorial or proprietary concept of the marginal sea had not, in 1789, become sufficiently crystallized as a rule of international law to cause ownership of the marginal seabed to be attributed to the original States at that time, particularly in the absence of a claim to that territory by them.

1. *Constitutions and statutes.*—If, prior to the admission of California to the Union, the original States had owned the bed of the open sea adjacent to their coasts, one would suppose that they would have defined their boundaries so as to have included it, or, in the alternative, would have declared it to be State property. However, no original State appears to have done either until after California was admitted, and several of them have never asserted such a claim.

The earliest boundary descriptions here pertinent are those contained in Massachusetts statutes

of 1760 and 1789, the Declaration of Rights in the Constitution adopted by North Carolina in 1776, a Georgia statute of 1783, a New Hampshire Act of 1791, an 1802 boundary description of South Carolina based on earlier State and colonial official documents, and the Maryland Constitution of 1776.[28]

The 1760 Act of the Province of Massachusetts Bay,[29] providing for the establishment of two new counties, defined their southern and southeasterly boundaries as the "Sea or Western Ocean", and included, in the case of the westernmost county "all the Islands * * * on the Sea Coast of the said new County", and, with respect to the other new county, "all the Islands to the Eastward of the County of *Cumberland* aforesaid." Similarly, in 1789,[30] the Massachusetts General Court defined the southern and southeasterly boundaries of the new county of Washington as "the sea or western ocean * * * including all the Islands on the sea-coast of the said easternmost county."

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[28] In the December, 1665, Report of the King's Commissioners concerning the New England Colonies, the Commissioners, after mentioning Rhode Island, Connecticut, Massachusetts, and New Plymouth said: "whereupon the Commissioners appointed the water the naturall bounds, of each Collony to be their present bounds, untill his Majesties pleasure be further knowne." 2 Rhode Island Colonial Records, p. 128.

[29] Acts and Laws of the Province of Massachusetts Bay (1759), c. IV, pp. 389, 390, 391.

[30] Laws of Massachusetts passed by the General Court (Begun on May 27, 1789), Vol. II, c. XXV, pp. 25, 27.

Article XXV of the North Carolina Declaration of Rights of 1776 defined the southern Boundary of North Carolina as "beginning on the sea side, at a cedar stake, at or near the mouth of Little River (being the southern extremity of Brunswick county)" and declared that[21]

> all the territories, seas, waters, and harbours, with their appurtenances, lying between the line above described, and the southern line of the State of Virginia, which begins *on the sea shore,* in thirty-six degrees thirty minutes, north latitude, * * * are the right and property of the people of this State. [Italics supplied.]

And the boundaries of Georgia were described in an Act of February 17, 1783,[22] as running

> from the mouth of the River Savannah * * *; from thence * * * along the Course of the said River St. Mary *to* the Atlantic Ocean and from thence to the Mouth or inlet of the River Savannah, Including and Comprehending all the lands and waters within the said limits, boundaries and Jurisdictional Right and also all the Islands within twenty Leagues of the Sea Coast.[23] [Italics supplied.]

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[21] 5 Thorpe, *American Charters, Constitutions and Organic Laws* (1909), p. 2789.

[22] Colonial Records of the State of Georgia, Vol. 19, pt. 2 (1911), p. 214.

[23] Section 23 of Article I of the Georgia Constitution of 1798 contained a substantially identical boundary description. 2 Thorpe, *op. cit. supra*, p. 794.

In 1791, the New Hampshire legislature defined the boundaries of the several counties of the State, and with reference to the county of Rockingham, adjoining the Atlantic Ocean, described its limits, *inter alia*, by the State line "to the sea, thence by the sea to the bounds first mentioned, including all that part of the Isle of Shoals which belongs to this State."[24]

In Governor Drayton's *View of South Carolina*, written in 1802, the boundaries of the State, as compiled from materials set out in 1 Statutes at Large (S. C. 1836) pp. 405–424, are described, in part, as follows:[25]

> It is bounded Northwardly by a line commencing at a Cedar Stake marked with nine notches, on the shore of the Atlantic ocean * * *. Thence along the River Savannah until it intersects the Atlantic ocean, by its most Northern mouth. Thence North-eastwardly *along the Atlantic ocean*, (including the Islands) until it intersects the Northern boundary near the entrance of Little River. [Italics supplied.]

Article III of the Declaration of Rights in the Maryland Constitution of 1776 provided that "the inhabitants of Maryland are also entitled to all

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[24] Laws of New Hampshire (1792), pp. 161–162, Act of June 16, 1791.

[25] 1 Statutes at Large (S. C. 1836), p. 404.

property, derived to them, from or under the Charter, granted by his Majesty Charles I. to Caecilius Calvert, Baron of Baltimore."[36] The Charter referred to is that of 1632, which defined the boundaries of the area granted, in part, as "all that part of the Peninsula, or Chersonese, lying in the Parts of America, between the Ocean on the East and the Bay of Chesapeake on the West".[37]

None of these provisions suggest any early ownership of the bed of the marginal sea by Georgia, Massachusetts, New Hampshire, North Carolina, South Carolina, or Maryland.[38] This becomes particularly evident when the boundary descriptions set out above are contrasted with those which appeared later and which, like the Massachusetts Act of 1859, for example, provided for the first time that "The territorial limits of this Commonwealth extend

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[36] 3 Thorpe, *op. cit. supra*, pp. 1686, 1687.

[37] 3 Thorpe, *op. cit. supra*, pp. 1677, 1678. Also granted were "all and singular the Islands, and Islets, from the Eastern Shore of the aforesaid Region, towards the East, which had been, or shall be formed in the Sea, situate within Ten marine Leagues from the said shore," and the "Fishings * * * in the Sea, Bays, Straits, or Rivers, within the Premises, and the fish there taken." *Ibid.*

[38] The word "seas" in the clause "territories, seas, waters, and harbours * * * lying between" the lines described, appearing in the North Carolina Declaration of Rights, *supra*, p. 95, must refer to the numerous sounds within the State, rather than the ocean proper, since one of the lines "described" was the "sea shore".

one marine league from its sea-shore at low-water mark".[39]

Of the six States mentioned thus far, North Carolina, South Carolina, and Maryland seem never to have declared that their boundaries encompassed the marginal sea, as distinct from the arms of the sea.[40] As has been noted, Massachusetts did extend its boundaries into the marginal sea, but not until 1859,[41] and Georgia did so in 1916, when, by statute, it adopted a boundary three *English* miles distant from low-water mark. Ga. Laws, 1916, p. 29. New Hampshire seems

[39] Mass. Acts, 1859, c. 289, p. 640. This statute was involved in *Manchester* v. *Massachusetts*, 139 U. S. 240, discussed, *infra*, pp. 156–157. Three years prior to the statute, in *Dunham* v. *Lamphere*, 3 Gray 268, 269–270 (Mass. 1856), it was stated that the territorial limits of the Commonwealth extended a marine league from the shore, but the statement was unsupported by any citation of such a claim by the political branch of the Commonwealth.

[40] The North Carolina Constitutions of 1868 and 1876 (Art. I, sec. 34) provide merely that "The limits and boundaries of the State shall be and remain as they now are." Since 1872, South Carolina has declared by statute that her northern boundary begins "at a point on the seashore" and that "On the east, the State is bounded by the Atlantic Ocean, from the mouth of the Savannah River to the northern boundary * * *, including all the islands." 1 R. S. (1872), pp. 2–3; Civil Code (1922), Part I, Tit. I, c. I sec. 1.

[41] California's reference to the resolution of the boundary dispute between the Massachusetts Bay Colony and the Colony of New Hampshire (Appendix to the Answer filed by the State, p. 707) is somewhat misleading. California alleges that "the conflict was referred to George II, King of England, who in 1737 decided that the line between the two Colonies should run three miles north of the Merrimac River,

and thereupon the line was surveyed in 1741. It runs: 'N. 86°07'30" E. 876 feet to the center of a granite monument on Salisbury beach, and thence in the same course three miles from low water mark to the limit of state jurisdiction.' Said line between Massachusetts and New Hampshire was approved by Acts of the Legislatures of the States of Massachusetts (Mass. Acts 1899, c. 369) and New Hampshire (N. H. Laws 1901, c. 115, p. 620)."

While this was, in essence, the line described in the Massachusetts Act of 1899, and the New Hampshire Act of 1901, an inference that the line was thus drawn during the colonial period is unjustified. The King's Commissioners met in 1737 and Massachusetts, at that time, claimed a boundary "beginning at the sea." Acts and Resolves, Massachusetts Bay (1737), vol. 12, p. 397. The commissioners recommended a line "beginning * * * at low Water mark" (*id.* at 407), and the decree of the King, dated April 9, 1740, reads, in part, as follows (Laws of New Hampshire, vol. 2, Province Period, 1702–1745 (Concord, 1913), pp. 790–794:

"His Majesty this day took the said Report into Consideration and was pleased with the Advice of His Privy Council to Approve thereof and Doth hereby accordingly Declare Adjudge and Order That the *Northern Boundarys of the said Province of the Massachusetts Bay are and be a Similar Curve Line pursuing the Course of Merrimack River at Three Miles Distance on the North Side thereof* **beginning at the Atlantick Ocean** *and ending at a point due North of a Place in the Plan returned by the said Commissioners called Pantucket Falls and a Strait Line drawn from thence due West cross the said River till it meets with His Majestys other Governments.* * * *"

This decree apparently did not settle the controversy, although a survey of the line prescribed in the decree was run in 1741. The controversy continued until the latter part of the nineteenth century, and of interest to us is a report of commissioners, dated August 16, 1888. These commissioners filed with their report a map, prepared by George Mitchell in 1741, on which *the survey line stopped at the seashore*, and recommended that "the line represented by the existing monu-

to have extended its boundary three miles into the sea in 1901.[42]

In addition to Maryland and North and South Carolina, it appears that New York, Delaware, and Virginia, never have claimed the marginal sea as being within their limits.[43] New York's

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ments which are marked upon the maps to accompany our respective reports" be adopted "with these changes": "From a copper bolt in Major's rock, supposed to have been placed there in 1834 to mark the Salisbury Marsh station, in Borden's survey of Massachusetts, easterly to the line of jurisdiction of the said States, *one marine league from the shore* * * *." [Italics supplied.] *New Hampshire, Report of the Commissioners appointed to ascertain and establish the true jurisdictional line between Massachusetts and New Hampshire, to the New Hampshire Legislature, 1889* (Manchester, John B. Clarke, Public Printer, 1889), pp. 8–9. This mention of a seagoing boundary appears in this 1888 report for the first time and does not seem to have been considered in the colonial period.

For the convenience of the Court, a copy of the Mitchell map referred to above has been lodged with the Clerk.

[42] See *supra*, note 41, p. 99.

[43] Ireland, *Marginal Seas Around the States* (1940), 2 La. L. Rev. 252–293, 436–478, contains a rather full discussion and collection of constitutional and statutory provisions of the various States. On February 22, 1939, the Delaware Senate passed a bill declaring that Delaware's ocean boundary extended 27 marine miles from shore and that the State owned the soil, etc., thereunder. But the Delaware House of Representatives appears not to have acted. The bill was modeled after the act passed by Louisiana in 1938 (La. Act 55 of 1938), discussed in the article by Ireland, *supra*, pp. 280–281, and by Loret, *Louisiana's Twenty-Seven Mile Maritime Belt* (1939), 13 Tul. L. Rev. 252. See also the discussion in *Power of a State to Extend its Boundary Beyond the Three Mile Limit* (Recent Statutes, 1939), 39 Col. L. Rev. 317.

case is particularly clear." And although Virginia has enacted that "All the beds of the bays, rivers, creeks, and the *shores* of the sea [i. e., tidelands] within the jurisdiction of this Commonwealth * * * shall continue and remain the property of the Commonwealth * * *" (Va. Code (1887), sec. 1338; Code (1924), sec. 3573), we have found no similar law with respect to the bed of the marginal sea.[45]

With respect to the two remaining original States bordering on the ocean, Rhode Island and

[44] The revised statutes enacted by New York in 1827 and 1828 described the State's boundaries as extending south "to Sandy Hook" and as including Long Island and various other named islands "and all the islands and waters in the bay of New York and within the bounds above described." 1 N. Y. Rev. Stat. (1829) Part I, c. I, tit. I, p. 65. The settlement in 1833 of the disputed boundary between New York and New Jersey provided that the boundary extended "*to* the main sea" [italics supplied]. N. Y. Laws, 1834, c. 8, p. 9. This phrase has been retained. N. Y. Consol. Laws, c. 57, art. 2, sec. 7. The use of such language, together with the absence of any description of a boundary *in* the ocean at a distance from the shore, is especially significant in view of the precise and detailed manner in which New York has defined its limits, including those located in rivers, bays, and lakes and in Long Island Sound, *Id.*, secs. 2–7.

[45] By an act passed in 1780, "all unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek * * *" were excepted from lands which could be granted by the Land Office of Virginia. 10 Henn. Stat. 226 (1780). No mention was made then or later of lands under the sea. In 1849, the general assembly of Virginia enacted a statute declaring that the "territory of this commonwealth and the boundaries thereof remain as they were" after the Constitution of 1776 was adoped. Va. Code (1849), tit. I, c. I, sec. 1. Prefatory to this declaration was a summary recital of the provisions of the First, Second, and

New Jersey,[46] it is sufficient to point out that they have enacted statutes declaring that their territorial limits extend a marine league into the sea from "high water mark" and the "shoreline", respectively, but that Rhode Island did not do so until 1872, and New Jersey until 1906.[47] The statute of New Jersey, in providing that "The territorial limits of each county of this State, fronting upon the sea-coast, be and the same are hereby extended * * * three nautical miles"

Third Virginia Charters, and of the Constitution of 1776, but, in summarizing the charter provisions, the assembly made no reference to the grant in the Third Charter which, it might be argued, conveyed a proprietary interest in the adjacent sea. See *infra*, pp. 108–109. The Constitution of 1776 contained no boundary descriptions relevant here. 7 Thorpe, *op. cit. supra*, pp. 3818–3819.

[46] Connecticut and Pennsylvania, although sometimes called coastal states are, for present purposes, treated as having no frontage on the ocean. Pennsylvania does not touch the ocean, and the Long Island Sound, on which Connecticut borders, has been held to be merely an arm of the sea. *Mahler* v. *Transportation Co.*, 35 N. Y. 352 (1866). See also *The J. Duffy*, 14 F. 2d 426–427 (D. Conn. 1926), reversed in other respects, 18 F. 2d 754 (C. C. A. 2); cf. *The Elisabeth*, 1 Paine 10, 8 Fed. Cas. No. 4,352 (C. C. D. N. Y., 1810). It may be noted, however, that in a series of boundary disputes between New York and Connecticut, commissioners, appointed again and again during the colonial period, consistently defined the Connecticut Colony's southern boundary as the sea (Long Island Sound). See Department of the Interior, *Boundaries, Areas, Geographic Centers, and Altitudes of the United States and the Several States* (2d ed.) Geological Survey Bulletin 817, pp. 102–104.

[47] R. I. Gen. Stats. (1872), Tit. I, c. I, sec. I; N. J. Laws (1906), c. 260, p. 542.

from the shoreline, plainly implies that previously the counties, at least, and hence presumably the State, had not embraced the marginal sea. Cf. *United States* v. *Newark Meadows Imp. Co.*, 173 Fed. 426, 427–428 (C. C. S. D. N. Y., 1909).

2. *Charters and grants of the Crown.*—That the ownership of the bed of the open sea had not yet become established and that the original States did not acquire ownership by succession to the rights of the colonies or the Crown's other grantees, is evidenced also by the provisions of most of the royal charters and grants.

The majority of these granting instruments, although designed to convey all the transferable proprietary and sovereign rights possessed by the Crown, and although specifically including the rivers, harbors, and bays, and the islands within certain distances from the coast, made no reference to the sea other than as a boundary, with the main exceptions that the royalty of fishing in the sea, as well as elsewhere, was granted in some instances. Thus, the Charter of Massachusetts Bay—1691, defined the bounds as running "to the Atlantick or Western Sea or Ocean on the South part * * * extending as farr as the Outermost Points or Promontories of Land called Cape Cod and Cape Mallabar * * * and * * * North-Eastward along the Sea Coast," and granted all the "Lands * * * Soiles * * * Havens Ports Rivers Waters

* * * within the said bounds and limitts * * * and alsoe all Islands and Isletts lying within tenn Leagues * * *."[48] Much the same provisions are found in the Charter of Maryland of 1632, referred to supra, p. 97, and in the King's grants of the area that became North Carolina.[49]

[48] 3 Thorpe, *American Charters, Constitutions, and Organic Laws* (1909), pp. 1870, 1876. Earlier grants of the territory which became Massachusetts were (1) the charter of New England of 1620, which described the bounds as being "from Sea to Sea," but also granted lands, soils, minerals, fishings, etc., "both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining" (*id.* at 1829, 1834); (2) The Charter of Massachusetts Bay of 1629, which contained similar provisions (*id.* at 1846–1850); (3) The Charter of the Colony of New Plymouth (Granted to William Bradford and his Associates—1629, which defined the boundaries as running "from sea to sea" (*id.* at 1842); and (4) The Charter of Massachusetts Bay—1629, in which the grants made in the Charter of New England were confirmed although the boundaries were again defined in terms of oceans and a mere free liberty of fishing in the adjoining seas was granted. *Id.* at 1846–1850.

[49] The Charter of Carolina of 1663 granted a "tract of ground" extending "as far as the south seas" together with "the fishing of all sorts of fish, whales, sturgeons, and all other royal fishes in the sea, bays, islets and rivers within the premises, and the fish therein taken." 5 Thorpe, *op. cit. supra*, p. 2744. Similar grants appear in the Charter of Carolina of 1665. *Id.* at 2762. While The Fundamental Constitutions of Carolina—1669, provided that "All wrecks, mines, minerals, quarries of gems, and precious stones, with pearl-fishing, whale-fishing, and one-half of all ambergris, by whomsoever found, shall wholly belong to the lords proprietors" (*id.* at 2785), that frame of government was abrogated by the lords proprietors in April, 1693. *Id.* at 2772, note a. As we have seen, moreover (*supra*, p. 95), the North Carolina Constitution of 1776 described the State's boundaries in terms of the sea.

The charters and grants to Delaware, Georgia, New Jersey, New York, and Rhode Island, fall into a somewhat different class but grant no more interest in the marginal sea than the charters of Massachusetts, Maryland, and North Carolina, already referred to. The grants with respect to New Jersey are typical. Charles II's grant to the Duke of York, of territory of which New Jersey was a part, conveyed:[*]

> * * * all that part of the maine land of New England begining at a certain place called or knowne by the name of St. Croix next adjoyning to New Scotland in America and from thence extending *along the sea Coast* * * * and also all that Island or Islands commonly called by the severall name or names of Matowacks or Long Island * * * with all ye lands island soyles rivers harbours mines minerals quarryes wood marshes waters lakes ffishings hawkings hunting and ffowling and all other royalltyes proffitts commoditys and hereditaments to the said severall islands lands and premisses *belonging and appertaining* * * *. [Italics supplied.]

[*] Grant of the Province of Maine—1664, 3 Thorpe, *op. cit. supra*, pp. 1637, 1638. Similar provisions with respect to New Jersey appear in the Duke of York's Release to John Lord Berkeley and Sir George Carteret, June 24, 1664 (5 Thorpe, *op. cit. supra*, p. 2534), the Duke of York's Grant to the Lord Proprietors of July 29, 1674 (*id.* at p. 2547), the Quintipartite Deed of Revision between East and West Jersey, July 1, 1676 (*id.* at pp. 2555–2556), and the Duke of York's Second Grant to William Penn, etc., August 6, 1680, *id.* at p. 2564.

It would be difficult to infer, from the use of the words "belonging and appertaining", that the adjoining ocean was intended to be included, particularly when rivers, islands, lakes, and harbors were specifically enumerated, and when the boundaries as such were described in terms of the "sea coast". Indeed, Mr. Justice Washington, speaking for the Circuit Court of the United States for the Third Circuit, early held, with particular reference to the New Jersey grants, that "Neither do we conceive that the limits of the state can, by construction, be enlarged in virtue of the grant of all rivers, fishings, and other royalties [belonging and appertaining]; which expressions ought, we think, to be confined to rivers, fishings and royalties *within the boundaries of the granted premises.*" *Corfield* v. *Coryell,* 4 Wash. 371, 384 (1823).[n]

[n] The Grants of the Province of Maine, 1664, and 1674, referred to *supra*, note 50, p. 105, also covered the territory which became Delaware (1 Thorpe, *op. cit. supra*, p. 557) and New York (5 Thorpe, *op. cit supra*, p. 2623). The First Charter of Virginia of 1606, which also covered Delaware and New York, described the boundaries as being "all along the Sea Coasts." 7 Thorpe, *op. cit supra*, pp. 3783–3784. The Charter for the Province of Pennsylvania, 1681, also applicable to New York, granted "Ports, Harbours, Bays, Waters, Rivers, Isles, and Inletts, belonging unto, or leading to and from the Countrey," and fishing rights and minerals within "the Countrey, Isles, or Limitts aforesaid." 5 Thorpe, *op. cit. supra*, pp. 3036–3037.

The Charter of Georgia—1732 defined the bounds as running "all along the sea coast" and granted all minerals, fish-

Of the remaining ocean-bordering original States,[52] New Hampshire, South Carolina, and Virginia took under grants that fall into a third, more doubtful class. While the Grant of New Hampshire to Captain John Mason, made in 1629, referred to the Charter of New England of 1620,[53] as having granted all the Seas and islands lying within 100 miles of any part of the coast,[54] the 1629 grant itself merely conveyed all prerogatives, rights and royalties in and upon the seas, defining the boundaries as running "along ye Sea coaste", and granting all islands within five leagues of the premises.[55] The Grant of the Province of New Hampshire to John Wollaston—1635,[56] in trust for John Mason,[57] defined the bounds as being "along ye Sea Coast", as did the Grant of the Province of New Hampshire to

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ings, etc., "within the said frontiers and precincts thereof and thereunto, in any sort belonging or appertaining." 2 Thorpe, *op. cit. supra*, pp. 765, 770–771. The Patent for Providence Plantations—1643, defined the bounds as "South on the Ocean" (6 Thorpe, *op. cit. supra*, pp. 3209, 3210) and the Charter of Rhode Island and Providence Plantations—1663, bounded the territory "on the south by the ocean" and also granted all lands, soils, waters, fishings, minerals, etc. "within the sayd tract, bounds, landes, and islands, aforesayd, or to them or any of them belonging, or in any wise appertaining." 6 Thorpe, *op. cit. supra*, pp. 3220–3221.

[52] See *supra*, note 46, p. 102.

[53] See *supra*, note 48, p. 104.

[54] 4 Thorpe, *op. cit. supra*, p. 2434.

[55] *Id.* at 2434–2435.

[56] *Id.* at 2437–2438.

[57] New Hampshire State Papers XXIX, Vol. VI, p. 68.

Mr. Mason, made on the 22nd of April, 1635, and referring to "Masonia."[88] However, the Grant of the Province of New Hampshire to Mr. Mason, made on the same day but referring to "New Hampshr", while bounding the territory granted "along the Sea Coast" and also specifying islands "within 5 Leagues distance from the premisses", also conveyed lands, soils, mines and minerals, royalties and the like "both within the Said Tracts of Lands upon the Maine and alsoe with ye Islands & Seas adjoyning".[89]

South Carolina and Virginia both took largely under the Three Virginia Charters, the first of which bounded the territory granted "all along the Sea Coasts",[90] but the latter two of which added a grant substantially the same as that found in the "New Hampshr" conveyance to Mr. Mason.[91]

While some of these granting provisions may be read to convey a proprietary interest in the

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[88] 4 Thorpe, *op cit. supra*, pp. 2441–2442.

[89] *Id.* at 2444.

[90] 7 Thorpe, *op. cit. supra*, pp. 3783–3784.

[91] The Second Charter of Virginia, 1609, *id.* at 3795–3796; The Third Charter of Virginia, 1611–1612, *id.* at 3803–3804. The Charter to Sir Walter Raleigh from Queen Elizabeth, 1584, granted "the right, royalties, franchises, and jurisdictions, as well marine as other within the saide landes, or Countreis, or the seas thereunto adjoining." 1 Thorpe, *op. cit. supra*, pp. 53–54.

"seas adjoining",[45] it is plain that, setting no limit to the extent of those seas, they were a reflection of the extravagant and contested claims then current rather than of the subsequently developed concept of the marginal sea. See *supra*, pp. 22–24. Moreover, we have shown that, with respect to New Hampshire and South Carolina at least, the later statutory and constitutional boundary descriptions of the revolutionary period contained no references to the adjacent seas. See *supra*, p. 96.

3. *The Treaty of 1783.*—What might be characterized as the "last word" of the Crown on the question of the boundaries of the thirteen original States is to be found in the Definitive Treaty of Peace between Great Britain and the United States, concluded at Paris on September 3, 1783. Article II of that instrument provided:[46]

> * * * that all disputes which might arise in future, on the subject of the boundaries of the said United States, may be

[45] In *The Lord Advocate* v. *Wemyss* [1900], A. C. 48 (1899), Lord Shand, in agreement with Lord Watson ([1900] A. C. at 67), said that, with respect to certain Crown charters made in 1651 ([1900] A. C. at 49), "it is inconceivable that at the time when these old grants were given, centuries ago, it entered into the mind of any one that there should be workings of minerals, not merely on the foreshore, but out into the bed of the sea for a considerable distance. Such a thing certainly had not existed, and I do not suppose it was thought of." [1900] A. C. at 81.

[46] 8 Stat. 80, 81–82.

prevented, it is hereby agreed and declared, that the following are, and shall be their boundaries, viz. * * * South by a line to be drawn due east from the determination of the line last mentioned, in the latitude of thirty-one degrees north of the Equator, to the middle of the river Apalachicola or Catahouche; thence along the middle thereof to its junction with the Flint river; thence strait to the head of St. Mary's river; and thence down along the middle of St. Mary's river *to the Atlantic ocean.* East by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands which divide the rivers that fall into the Atlantic ocean, from those which fall into the river St. Lawrence; comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova-Scotia on the one part, and East-Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic ocean; excepting such islands as now are, or heretofore have been within the limits of the said province of Nova-Scotia. [Italics supplied.]

There is no suggestion in this boundary description of a recognition of a jurisdictional or terri-

torial right of the signatory thirteen States in the bed of the marginal sea.

4. *The courts and other common-law authorities.*—Our researches into the English and American decisions of the 1776–1789 period reveal no cases in which the question of the ownership of the bed of the sea is either discussed or resolved. This is not particularly surprising since it is at least doubtful that, at that time, economic and industrial development either called for, or permitted of, use of the bed of the open sea to any substantial extent. See *supra,* note 62, p. 109.[64]

However, in *Shively* v. *Bowlby,* 152 U. S. 1, 13, Mr. Justice Gray said that "in England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage." Since that case did not involve the bed of the marginal sea (see *supra,* note 6, p. 70), it is not perfectly clear

[64] See also Borchard, *Resources of the Continental Shelf* (Jan. 1946) 40 A. J. I. L. 53, 61: "It is, of course, true that the 1702 rule as to marginal seas and its arbitrary identification with three miles or one marine league antedated by centuries the modern discovery of and accessibility of sedentary resources and modern methods of extracting and utilizing them. In 1702 surface fishing, needed for sustenance, was practically the only marine industry known."

that the above-quoted language reflects a conviction on the part of the Court that the bed of the sea proper, as distinct from the bed of inland waters including arms of the sea, was owned by the sovereign, in the eyes of the common law, during the early days of this Nation. Whether the Court was concerning itself at all with the problem of the open sea becomes even more doubtful when it is noted that the cases cited to support the statement quoted involved, without exception, waters other than the ocean itself.

There can be little doubt, however, that Lord Hale, writing in the seventeenth century—a period in which England's "preposterous pretensions" still held sway [65]—took the view that such ownership of the bed of the sea was to be attributed to the sovereign.[66] This extravagant view was even echoed in the writings of later common-law commentators,[67] and some opinions of early

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[65] See Fulton, *The Sovereignty of the Sea* (1911), pp. 5, 14–15.

[66] Hale, *De Jure Maris*, in Hargrave, Francis, *A Collection of Tracts Relative to the Law of England* (1787), Vol. 1, pp. 10–17.

[67] See, *e. g.*, Chitty, *Prerogatives of the Crown* (1820), pp. 142, 173, 206; Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm* (1830), pp. 1–6. With reference to the position taken by Hall and Chitty, Sir John Salmond has said that "It is scarcely necessary to say that such claims, if they ever in truth possessed legal validity, have long since been abandoned by the Crown." *Territorial Waters* (1918), 34 Law Q. Rev. 235, 240.

nineteenth century courts [68] contain dicta reaffirming Lord Hale's principles."[69]

But whether or not this Court's language in *Shively* v. *Bowlby* should be construed as applicable to the problem before us, it is clear that what is perhaps the most exhaustive English judicial opinion on the question does not accept the proposition that Lord Hale's views were accurate characterizations of the law either in his own seventeenth century,[70] or in the American Revolutionary

[68] *E. g.*, *Arnold* v. *Mundy*, 1 Halsted, 1, 71 (N. J. 1821); *Blundell* v. *Catterall*, 5 B. & Ald. 268, 106 Eng. Rep. 1190, 1199 (K. B. 1821); *Benest* v. *Pipon*, 1 Knapp 60, 12 Eng. Rep. 243, 246 (1829); Cf. *Rex* v. *49 Casks of Brandy*, 3 Hagg. Ad. 257, 289–290, 166 Eng. Rep. 401 (1836). Compare *Browne* v. *Kennedy*, 5 Harris & Johnson 195, 209 (Md. 1821), in which ownership of the soil under navigable rivers and arms of the sea is attributed to the King, but no mention is made of the bed of the open sea.

[69] A few very early cases also contained references to Hale's views or those of Selden. See *supra*, pp. 24–25. In *Johnson* v. *Barret*, Aleyn 10, 82 Eng. Rep. 887 (1681), a case in which Hale was counsel, both sides "clearly agreed, that if [a key] were erected beneath the low water-mark, then it belonged to the King." See also *The Case of the Royal Fishery of the Banne*, Sir John Davies's Reports, 149, 154–155 (King's Courts in Ireland—reports translated in 1762), as to which a New Jersey court, in 1821, had to make "a little allowance for both the judge and the reporter being disciples of Selden and converts to his doctrine of the *mare clausum* * * *." *Arnold* v. *Mundy*, 1 Halsted 1, 74. But Angell, Joseph K., *The Right of Property in Tide Waters* (1847), pp. 20–21, nevertheless relied on the river Banne case for his statement that the King owns the bed of the adjacent sea.

[70] See Fulton, *The Sovereignty of the Sea* (1911), p. 543.

period. The opinion of Lord Chief Justice Cockburn in *The Queen* v. *Keyn*, L. R. 2 Exch. Div. 63 (1876), a case in which the court was sharply divided, is especially enlightening in this respect. Referring to the doctrines enunciated by Lord Hale, he said (p. 175):

> * * * It is in vain, therefore, that the ancient assertion of sovereignty over the narrow seas is invoked to give countenance to the rule now sought to be established, of jurisdiction over the three-mile zone. If this rule is to prevail, it must be on altogether different grounds. To invoke as its foundation, or in its support, an assertion of sovereignty which, for all practical purposes, is, and always has been, idle and unfounded, and the invalidity of which renders it necessary to have recourse to the new doctrine, involves an inconsistency, on which it would be superfluous to dwell.

In the same case, Sir Robert Phillimore said that (p. 67):

> There appears to be no sufficient authority for saying that the high sea was ever considered to be within the realm, and, notwithstanding what is said by Hale in his treatises de Jure Maris and Pleas of the Crown, there is a total absence of precedents since the reign of Edward III., if indeed any existed then, to support the doctrine that the realm of England extends beyond the limits of counties.

It was Lord Cockburn's view that "beyond low-water mark the bed of the sea might, I should have thought, be said to be unappropriated, and, if capable of being appropriated, would become the property of the first occupier." L. R. 2 Exch. Div. at 198–199.[n]

In any event, this Court itself said in *Shively* v. *Bowlby*, 152 U. S. 1, 14, that "the common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and laws of the United States." That being so, we believe it plain that whether or not England claimed proprietary rights in the marginal sea, the constitutions, statutes, charters, and treaty set out above, *supra*, pp. 93–111, make it clear that the thirteen original States did not claim ownership of the bed of the marginal sea.

5. *International law.*—It is not surprising that the original States made no claim to ownership of the marginal sea, for, as we shall show, the concept of a proprietary interest in the bed of the marginal sea did not become an accepted principle of international law until sometime after the Constitution was adopted. The embryonic status of the concept of the marginal sea, and certainly of a theory of

[n] But *cf. Secretary of State for India* v. *Chelikani Rama Rao*, L. R. 43 Ind. App. 192 (1916).

ownership thereof, makes it wholly unreal, absent a specific claim by the original States, to attribute to them ownership of the marginal sea before 1789. Such ownership as thereafter came into being under the sponsorship of the national government vested not in the individual States, but in the United States. See *supra*, pp. 74–89. In examining the status of international law in regard to the existence of rights in the marginal sea at that time, we shall consider (a) the writings of publicists, (b) early statutes, treaties, and executive documents of the United States, and (c) European treaties and decrees.

(a) *The writings of publicists.*—The contrariety of opinion among the publicists of the sixteenth and seventeenth centuries on the question of ownership of an adjacent sea has been referred to in our discussion of the development of the concept of the marginal sea (*supra*, pp. 23–25). The eighteenth century writers continued this debate, and certain of them argued that the sea adjacent to the coast of a nation could be appropriated by it and, at least for some purposes and to some distances, should be considered as territory belonging to it.[11] In the latter half of the eighteenth century, several writers even said that

[11] See, *e. g.*, *Wolff, Jus Gentium* (1764), secs. 128, 130; translation by Drake, *Classics of International Law* (1934), pp. 72–73; Bynkershoek, *De Dominio Maris Dissertatio* (1702), translation by Magoffin, *Classics of International Law* (1923), p. 43.

the territorial character of the adjacent sea was recognized by the law of nations to the minimum distance of a cannon-shot from the shore. Vattel wrote in 1758 that the sea "within reach of a cannon-shot from the coast is regarded as part of the national territory";[73] and Von Martens, in 1788, that "A custom, generally acknowledged, extends the authority of the possessor of the coast to a cannon shot from the shore; * * * and this distance is the least that a nation ought now to claim, as the extent of its dominion on the seas."[74]

These expressions serve to indicate the advanced stage of development which the concept had reached in the minds of some European publicists shortly prior to the adoption of our Constitution. But they are not to be taken as an accurate statement or reflection of the law of nations, for they appear to have been founded, not upon then existing treaties, statutes, orders, regulations, decisions, or general usages, but upon an extension of the theories held by their authors and by earlier publicists. As Lord Chief Justice

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[73] *Le Droit de Gens*, translation by Fenwick, *Classics of International Law* (1916), p. 109.

[74] Von Martens, G. F., *The Law of Nations*, translated by William Cobbett (1829), p. 160. Johannes Julius Sarland, a German, writing in 1750, stated that the territorial sovereignty extended as far as the range of cannon shot. The same view was expressed by Johann Jakob Moser, in the same year. Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942), p. 22.

Cockburn said, in *The Queen* v. *Keyn*, L. R. 2 Exch. Div. 63, 202 (1876), "writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it." Such few treaties or other factual sources as were (or as might have been) invoked failed to illustrate that the law of nations had reached the point claimed for it.

The theoretical status of the concept at the time in question is apparent further from the points of uncertainty and disagreement evident in the writings of the publicists. These points were so marked as to have been inconsistent with the existence of any established law of nations upon the subject. Wolff, who published in 1749,[11] and, in some passages, Bynkershoek (1702),[12] Vattel (1758),[13] and Von Martens (1788),[14] seemed unwilling to go further than to say that the sea adjacent to the coast and certain other tracts of ocean "could be occupied" by the littoral nation

[11] *Jus Gentium*, sec. 128. See translation of 1764 edition by Drake, *Classics of International Law* (1934), p. 72.

[12] *De Dominio Maris Dissertatio*, translation by Magoffin, *Classics of International Law* (1923), p. 43.

[13] *Le Droit de Gens*, translation by Fenwick, *Classics of International Law* (1916), p. 107.

[14] *The Law of Nations*, translated by William Cobbett (1829), p. 160.

and were *susceptible* of ownership by it, the most quoted sentence of Vattel being the question "Who can doubt that the pearl fisheries of Bahrein and Ceylon may be lawful objects of ownership?"[79] Bynkershoek apparently considered that there could be no ownership in the sea in the absence of an intention to claim and protect it.[80] But neither he nor any other publicist purported to name the nations which had the necessary intent, and the original thirteen colonies do not appear to have had it.

The most significant differences of opinion among the publicists were with respect to the purposes for which the adjacent sea should be treated as attaching to the littoral nation, and with respect to its extent. Some writers, such as Casaregis, took the position that it should be treated as subject to the same degree of domination as the land, including even the right of the littoral nation to prohibit the innocent passage of foreign ships through it or to impose tolls upon them.[81] Vattel, on the other hand, and most later publicists, in accord with the view of Grotius, upheld the right of innocent passage, maintaining that the littoral nation's authority in the adjacent sea

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[79] *Le Droit de Gens*, translation by Fenwick, *Classics of International Law* (1916), p. 107.

[80] *De Dominio Maris Dissertatio*, translated by Magoffin, *Classics of International Law* (1923), p. 42.

[81] Casaregis, *Discursus Legales de Commercio* (1760), Discursus CXXXVI, Vol. 2, pp. 40–41.

was more limited than its authority on land and in its ports.[82]

With regard to the extent of the adjacent sea, there was even wider disagreement.[83] Publicists of the sixteenth and seventeenth centuries had fixed the distance from the shore variously at 60 miles,[84] two days' sail,[85] as far as bottom could be sounded with a lead-line,[86] and as far as served as a defense.[87] During the eighteenth century, the cannon-shot theory of Bynkershoek was adopted by several continental, as distinct from English, writers, but there appears to have been no agreement as to the distance in miles entailed in the theory; Von Martens considered the distance to be three leagues,[88] Galiani three miles.[89] Azuni,

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[82] *Le Droit de Gens*, translated by Fenwick, *Classics of International Law* (1916), p. 108.

[83] See 1 Azuni, *The Maritime Law of Europe*, translation by Johnson (1806), pp. 196–204.

[84] See Bodin, *De Republica* (1609), p. 267. In this edition, which was written in Latin, Bodin set the distance at "sexaginta miliarib." In his earlier edition, published in French and later translated into English, it was fixed at "xxx "lieües" or "thirtie leagues." *Les Six Livres de la Republique* (1579), p. 171, translation by Knolles (1606), p. 179.

[85] See Loccenius, *De Jure Maritimo*, lib. 1, c. 4, sec. 6, included in *Jus Maritimum* (1674), pp. 180–181.

[86] See 2 Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine du mois d'Août*, 1681 (1766 ed.), p. 687.

[87] See Pufendorf, *De Jure Naturae et Gentium* (1688), translation by Oldfather, *Classics of International Law* (1934), pp. 564–565.

[88] Von Martens, *The Law of Nations*, translated by William Cobbett (1829), p. 160.

[89] Galiani, *De' Doveri de' Principi Neutrali* (1782), p. 422.

writing in 1795–1796, advocated the three-mile distance, but said that it had not yet been established and that "The greatest number of writers, however, carry the extent of dominion to the distance of one hundred miles."[90] Galiani and Azuni seem thus to have been the only important writers during the second half of the eighteenth century to announce the three-mile equivalent of cannon range.

(b) *Early statutes, treaties, and executive documents of the United States:*[91] *Statutes.*— The only actions of the Continental Congress, prior to the adoption of the Constitution, which could be considered at all pertinent, so far as can be discovered, are (1) a proclamation and an ordinance passed May 9, 1778, and April 7, 1781, respectively, directing ship captains not to capture enemy vessels "being under the protection of neutral coasts, nations or princes" (4 Journals of Congress 198; 7 Journals of Congress 67, 68); (2) an ordinance of December 4, 1781, declaring

[90] 1 Azuni, *The Maritime Law of Europe*, translation by Johnson (1806), p. 197. See also Casaregis, *op. cit. supra*, Vol. 2, p. 43.

[91] Certain American constitutional and statutory provisions, as well as the boundary description in the Treaty of 1783, have been dealt with in the course of our discussion of the municipal law of the period, *supra*, pp. 93–103, 109–111; both these and the materials dealt with in this section of this brief have a dual significance—municipal and international—and the decision to treat a particular item under one topic or the other must, of necessity, be largely arbitrary.

that all goods made in Great Britain, "if found within three leagues of the coasts," were liable to capture under certain circumstances, although in United States or neutral ships, and declaring further that captures of enemy property should be adjudged lawful when made by various vessels or persons, including those made by "inhabitants of the country, if made within cannon-shot of the shore" (7 Journals of Congress 185, 186–187); and (3) an ordinance of February 26, 1782, providing that when a vessel owned by a United States citizen "sailing or being within the body of a county or within any river or arm of the sea, or within cannon shot of the shore of any of these states" was captured by the enemy and later recaptured by another citizen of the United States, it should be restored to the original owner upon payment of a reasonable salvage, without regard to the length of time the enemy had been in possession (7 Journals of Congress 225–226).

While each of these provisions illustrates that the Congress believed that particular obligations and rights should be operative within cannon-shot or some other distance from the coast, none of them appears to have been based on the notion that the sea within such distance was *territorial*. The phrase "under the protection of neutral coasts" in the provisions first cited, together with the proclamation's reference to captures there as being "contrary to the usage and custom of

nations" and as reflecting "dishonor upon the national character of these states" (4 Journals of Congress 198), show that the provisions were based on an observance of a neutral's right of protection of, and respect for, its coasts, rather than upon any recognition of ownership in the adjacent sea. Somewhat similar action was taken at the outset of World War II in the Declaration of Panama, in which the signatory American Republics undertook to create a security zone averaging 300 miles. See *supra*, p. 58. In both situations, there was merely a declaration of a neutrality belt, not an assertion of proprietary rights. The ordinance of December 4, 1781, obviously did not depend upon the territorial concept or imply any acceptance of it, and that of February 26, 1782, seems to have been based simply on the consideration that since recaptures within enclosed waters or cannon-shot of the shore could be effected more easily than those more distant, the reward should be limited to a reasonable salvage."

Such statutes as were enacted by Congress during the decade subsequent to the adoption of the

" Previously, under an ordinance of December 5, 1775, the amount of reward for recaptures depended upon the number of hours the enemy had been in possession. 1 Journals of Congress, 261–262. Several European nations had similar laws. See 2 Azuni, *The Maritime Law of Europe*, translation by Johnson (1806), pp. 273–312.

Constitution likewise fail to indicate any acceptance of the proprietary theory. Indeed, the language in the Act of June 5, 1794 (1 Stat. 381, 384), providing that:

> * * * the district courts shall take cognizance of complaints by whomsoever instituted, in cases of captures made *within the waters of the United States, or within a marine league of the coast or shores thereof.* [Italics supplied.]

and the reference in the next section to:

> * * * every case of the capture of a ship or vessel within the jurisdiction *or protection* of the United States as above defined * * *. [Italics supplied.]

indicate that the sea within the three-mile limit was regarded as being outside the territory of the United States. In fact, it was so held in an early interpretation of this Act, the court construing the word "jurisdiction" in the section above quoted as having been used with respect to the waters of the United States, and the word "protection" with respect to the sea within a marine league of the coast. *Soult* v. *L'Africaine,* Bee 204, 207, 22 Fed. Cases No. 13,179, pp. 805, 806 (D. S. C., 1804). See also *The Hungaria,* 41 Fed. 109, 111 (D. S. C., 1889). A similar inference might be drawn from the absence of any mention of the open sea in statutes enacted in 1794 and

1797, providing for the forfeiture of arms intended for export found on vessels "in any river, port, bay or harbor within the territory of the United States" (1 Stat. 369, 520, 521). The only other statutes to be noted are the revenue acts of 1790 and 1799, which authorized collectors to board and inspect inbound ships "in any port of the United States, or within four leagues of the coast thereof" in aid of enforcing the customs laws (1 Stat. 145, 164; 1 Stat. 627, 668).[34] But these statutes involved no claim of territorial right in the sea. Like the British and other hovering acts, they were an exercise of the police power of a nation to take measures at a reasonable distance in the sea, beyond the limits of its territory, to prevent violations of its revenue laws and otherwise "secure itself from injury." *Church* v. *Hubbart,* 2 Cranch 187, 234; *The Apollon,* 9 Wheat. 362, 371; *The Queen* v. *Keyn,* L. R. 2 Exch. Div. 63, 214–216 (1876).[35]

[34] The Act admitting Louisiana into the Union bounded that State, in part, "by the said gulf [of Mexico], to the place of beginning, including all islands within three leagues of the coast". 2 Stat. 701, 702 (1812). The Act authorizing the formation and admission of Alabama also bounded it by the Gulf of Mexico, but included islands "within six leagues of the shore". 3 Stat. 489, 490 (1819).

[35] See also 1 Wheaton, *Elements of International Law* (6th ed., 1929), pp. 367–368; 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945), p. 777; Oppenheim, *International Law* (5th ed., 1937), p. 389; Dickinson, *Jurisdiction at the Maritime Frontier* (1926), 40 Harv. L. Rev. 1, 13–14.

Treaties.—Several of the eighteenth century treaties of the United States contained agreements binding the parties to certain rights or obligations applicable in the sea bordering their coasts. Articles VI and VII of the treaty of 1778 with France provided that the parties would defend each other's ships in their "ports, havens, or roads, or on the seas near to" their countries within their "jurisdiction," and Article IX prohibited French subjects from fishing "in the havens, bays, creeks, roads, coasts or places, which the said United States hold, or shall hereafter hold" (8 Stat. 12, 16).[96] Article V of the treaty of 1782 with the Netherlands bound the parties to defend each other's ships "in their ports, roads, havens, internal seas, passes, rivers, and as far as their jurisdiction extends at sea" (8 Stat. 32, 34); Article VII of the treaties of 1785 and 1799 with Prussia "within the extent of their jurisdiction by sea or by land" (8 Stat. 84, 86–88; 8 Stat. 162, 164); and Article XXV of the treaty of 1794 with Great Britain "within cannon-shot of the coast,

[96] Contrast Article III of the Treaty of Paris with Great Britain in 1783, which provided that the people of the United States should continue to enjoy the right of fishing along the coasts of His Majesty's dominions in America. 8 Stat. 82. Strangely enough, the Americans had been prepared to waive any fishing rights within three leagues of foreign shores. See Crocker, *The Extent of the Marginal Sea* (1919), p. 630.

[and] in any of the bays, ports, or rivers of their territories" (8 Stat. 116, 128).[*]

It seems evident, however, that these provisions neither recognized nor created proprietary rights in the sea. The treaties related to the protection of the ships of the contracting parties and not to the ownership of the waters or soil thereunder. Moreover, with the exception of the article last cited, the agreements were indefinite as to distance from the coast.

Similarly, the early treaties ceding territory or defining boundaries contain nothing to indicate an adoption of the territorial sea concept. As we have seen, supra, pp. 109–111, Article II of the Treaty of Paris with Great Britain in 1783 described our boundary as extending south "to the Atlantic ocean * * * comprehending all islands within

[*] Article XXV of the Treaty of 1794 with Great Britain, more fully quoted, provided (8 Stat. 128):

"Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other, to be taken within cannon-shot of the coast, nor in any of the bays, ports, or rivers of their territories, * * *. But in case it should so happen, the party whose territorial rights shall then have been violated, shall use his utmost endeavours to obtain from the offending party, full and ample satisfaction for the vessel or vessels so taken, * * *."

Apparently, the references to violations of "territorial rights" included captures within cannon shot of the coast, as well as in the "bays, ports, or rivers of their territories." If so, the description seems to have been unique among eighteenth century treaties, and none comparable seems to have appeared before 1789.

twenty leagues of any part of the shores of the United States," but made no mention of the sea adjoining the coast or such islands (8 Stat. 80, 81–82). Likewise, the treaty of 1795 with Spain (Art. II) described our southern boundary as extending merely "to the Atlantic ocean" (8 Stat. 138, 140).

Executive documents.—Clear evidence of the immature status of the territorial or proprietary concept prior to the adoption of the Constitution and for some years thereafter is afforded by certain documents of the Executive Department, the earliest of which are dated 1793. Several of these documents also show that the subject then, as now, was of paramount concern to the Federal Government and that the Executive Department took action with respect to it without regard to any supposed rights of the States and apparently without any action or protest on their part.

The earliest executive pronouncement of interest is a statement of Attorney General Randolph in an opinion dated May 14, 1793, concerning the legality of a French capture of a British ship in Delaware Bay (1 Op. A. G. 32). In holding that Delaware Bay, as distinct from the sea itself, was territory within the United States and that the capture was illegal, the Attorney General pointed out (p. 34) that:

> From a question originating under the foregoing circumstances, is obviously and properly excluded every consideration of a

> dominion over the *sea*. The solidity of our neutral rights does not depend, in this case, on any of the various distances claimed on that element by different nations possessing the neighboring shore. But if it did, the field would probably be found more extensive and more favorable to our demand than is supposed * * *; for the *necessary* or *natural* law of nations, (unchanged as it is, in this instance, by any compact or other obligation of the United States) will, perhaps, when combined with the treaty of Paris in 1783, justify us in attaching to our coasts an extent into the sea beyond the reach of cannon-shot.

While the words "will * * * justify us in attaching to our coasts an extent into the sea beyond the reach of cannon-shot" might be construed to mean that the sea within the range of cannon-shot but no further, was considered a part of our territory, they appear rather to imply a belief that none of the adjacent sea had yet been annexed. This is confirmed by Attorney General Randolph's further statements that (p. 34) "The high ocean, in *general*, it is true, is unsusceptible of becoming property" and (p. 37) "the United States, in the commencement of their career, ought not to be precipitate in declaring their approbation of any usages, (the precise facts concerning which we may not thoroughly understand), until those usages shall have grown into

principles, and are incorporated into the law of nations * * *".

The view that the adjacent sea had not already been annexed as territory of the United States is consistent with subsequent executive action and phraseology. Thus, on November 8, 1793, Thomas Jefferson, Secretary of State, wrote the British minister as follows:[97]

> The President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by

[97] This letter is reprinted in full in H. Ex. Doc. No. 324 (42d Cong., 2d Sess.), pp. 553–554. The paragraphs quoted also appear in 1 Moore, *International Law Digest* (1906), pp. 702–703.

any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league.

Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.

For the jurisdiction of the rivers and bays of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States.

It is manifest that this letter was not an assertion of ownership over the area mentioned. It merely purported "to fix provisionally on some

distance" for the limited purpose of protection. The reference to the laws of the States with respect to the rivers and bays would seem to support the contention that the States had assumed jurisdiction over such areas but not over the open sea.

In a similar letter of the same date to the French minister, Jefferson spoke of "the line of territorial protection," of the distance to which governments "might reasonably claim a right of prohibiting the commitment of hostilities," of the "margin of protected navigation," and of the distance "which we may ultimately insist on the right of protection."[88] Nothing in either letter suggests that the three-mile belt was deemed territorial. The same is true of President Wash-

[88] American State Papers, For. Rel. I, 183. The pertinent portions of the letter read as follows:

"I have now to acknowledge and answer your letter of September 13, wherein you desire that we may define the extent of the line of territorial protection on the coasts of the United States, observing that Governments and jurisconsults have different views on this subject.

"It is certain that, heretofore, they have been much divided in opinion as to the distance from their sea coasts, to which they might reasonably claim a right of prohibiting the commitments of hostilities. The greatest distance, to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea-league. Some intermediate distances have also been insisted on, and that of three sea-

ington's address to Congress on December 3, 1793,[m] Secretary of State Randolph's letter of June 21, 1794, to the British minister,[l] and the Commissioner's decisions under Article VII of the treaty of 1778 with France in *The Fanny, Pile, Master,* decided October 16, 1798,[k] and *The Elizabeth, Ross, Master,* decided November 5, 1798,[j] all of which referred to captures by European belligerents of each other's vessels near our shores. These respectively described captures within three miles of the coast as being "within the protection of our territory," "within the par-

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leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation, as any nation whatever. Not proposing, however, at this time, and without a respectful and friendly communication with the Powers interested in this navigation, to fix on the distance to which we may ultimately insist on the right of protection, the President gives instructions to the officers, acting under his authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league, or three geographical miles from the sea shores. This distance can admit of no opposition, * * *.

"* * * For that of the rivers and bays of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States."

[m] American State Papers, For. Rel. I, 21–23.

[l] H. Ex. Doc. 324, 42d Cong., 2d Sess., 582.

[k] 4 Moore, *International Adjudications* (1931), 518, 526–527.

[j] *Id.*, 529, 533, 536, 537.

ticular protection of the United States," within the "jurisdictional protection of the United States" and within the "line of jurisdictional protection." The absence of any assertion of ownership also characterizes Secretary of State Pickering's statement in a letter to the Lieutenant Governor of Virginia, dated September 2, 1796, that—

> Our jurisdiction * * * has been fixed (at least for the purpose of regulating the conduct of the government in regard to any events arising out of the present European war) to extend three geographical miles (or nearly three and a half English miles) from our shores; * * * *

It is highly significant that the United States was the first nation to assert the three-mile equivalent of cannon-shot range, and that it did not do so until 1793.[4] There certainly was nothing in pre-

[4] Quoted in 1 Moore, *International Law Digest* (1906), p. 704. In *The Answer*, which was written by Alexander Hamilton in December 1796, in an unofficial capacity, the author upheld the view that French and other foreign captures within a marine league of our coasts were illegal, saying *inter alia* that "In extending our dominion over the sea to one league, we have not extended it so far as the example of France and the other powers of Europe would have justified." *The Works of Alexander Hamilton*, (Hamilton's Ed., 1851), Vol. 7, pp. 602–603. This is the only instance we have found in which an American statesman in the eighteenth century used the word "dominion" with reference to the three-mile belt. Moreover, Hamilton obviously was referring to the action taken in 1793 and announced in Jefferson's letters, not to any assumption of dominion prior to the adoption of the Constitution.

[5] Fulton, *The Sovereignty of the Sea* (1911), p. 573.

constitutional American practice on which to rest ownership by a littoral state of the bed of its marginal sea.

(c) *European treaties and decrees.*—That the concept of ownership of the adjacent sea had not become a part of the law of nations at the time of the adoption of our Constitution is attested by the pertinent European treaties and decrees of the period in question. So far as can be discovered, there is none which can be cited as having adopted or been based upon the principle of proprietorship, and some seem definitely inconsistent with the view that the law of nations had assimilated the principle.

The most numerous group of these treaties and decrees consists of those relating to the rights and obligations of neutral nations as regards captures or hostilities within certain distances from their coasts. During the seventeenth century, the boundaries agreed upon were frequently vague, and varying considerations determined jurisdiction in particular cases.[6] Later, during the eighteenth century, it was the range of cannon-shot,[7] with occasional exceptions as in the case of

[6] Fulton, *The Sovereignty of the Sea* (1911), p. 552.

[7] *Id.* at pp. 571–573. Cf. Meyer, C. B., *The Extent of Jurisdiction in Coastal Waters* (1937), pp. 51, 62–63, 78. See also the Genoan edict of 1779, the Venician edict of 1779, and the Russian ruling of 1787, as described in De Cussy, *Phases et Causes Célèbres du Droit Maritime des Nations* (1856), an excerpt from which appears in translation in Crocker, *The Extent of the Marginal Sea* (1919), pp. 49–50, and see also Crocker, pp. 597–598 (texts of edicts of Genoa and Venice).

the treaty of 1784 between Spain and Tripoli in which the distance was put at ten leagues.[8] The adoption of the cannon-shot measure, however, does not appear to have been an incident of, or to have been accompanied by, adoption of the theory of proprietorship. A few early treaties antedating Bynkershoek contained provisions that "to avoid all confusion" or "to prevent all disorders" the ships of the signatories under certain circumstances should not approach one another closer than the distance of cannon-shot,[9] and it may well be that these, rather than Bynkershoek or his followers, inspired the specification of the same distance in the neutrality treaties. In any event, it seems certain that the latter, as said by Lord Chief Justice Cockburn (*The Queen* v. *Keyn*, L. R. 2 Exch. Div. 63, at 205 (1876), adopted the cannon-shot distance "not as matter of existing right established by the general law of nations, but as matter of mutual concession and convention," and that, as observed by Raestad, they were based "on respect for the coast properly

[8] Treaty of September 10, 1784, Art. 6, translation in Crocker, *op. cit. supra*, p. 623. See also Crocker, *op. cit. supra*, p. 49.

[9] Article XIV of the treaty of commerce and alliance between Great Britain and Spain (1667), *id.* at pp. 533–534. Article IV of the amended treaty of peace between the Federated States of Belgium and the Kingdom of Algiers (1662), *id.* at p. 511. Early treaties of the United States contained similar provisions "for the avoiding of any disorder." 8 Stat. 28, 48, 74, 92, 148.

speaking," rather than upon any appropriation of the adjacent sea.[10] It appears, then, that not until the early part of the nineteenth century did any European treaties or decrees refer to the sea within the range of cannon-shot (or to any other extent) as being "territory" or "territorial." On the contrary, in several instances as late as 1801, the area was treated as distinct from territory, including ports and harbors, belonging to the littoral nation.[11] Indeed, the mere fact that any treaties at all were entered into upon the

[10] *La Mer Territoriale* (1913), translated in Crocker, *op. cit. supra*, p. 404. See also the translations, Crocker, pp. 519–598, and 624, showing, respectively, as follows: The French Ambassador at Copenhagen informed the Dano-Norwegian Government in 1691 that "*Respect of the coasts* of any part of Europe whatsoever has never been extended further than cannon range, or a league or two at the most." The treaty of 1787 between Russia and the Two Sicilies referred to the illegality of attacking enemy vessels within cannon range of the coasts of a neutral as "an interesting principle of the law of nations *concerning neutral navigation*." (Italics supplied.) The Spanish prize regulations of 1797 provided that "*The immunity of the coasts* of all my dominions is not to be marked as hitherto by the doubtful and uncertain range of cannon, but by the distance of two miles of 950 toises each." (Italics supplied.) The italicized phrases, while not inconsistent with the concept of the adjacent sea as territorial, probably would not have been used had that concept been recognized.

[11] The treaty of 1801 between Russia and Sweden, after binding the parties in case of war not to attack enemy vessels "within cannon range of the coasts of his ally," contains the additional pledge that they will observe "the most perfect neutrality in the harbors, ports, gulfs, and other waters comprised in the term closed waters, *which belong to them respectively*." (Italics supplied.) Crocker, *op. cit. supra*, p.

subject might be viewed as indicating that the concept was not a part of the general law of nations. Thus Lord Chief Justice Cockburn commented in the *Keyn* case that (L. R. 2 Exch. Div. at p. 205):

> * * * if the territorial right of a nation bordering on the sea to this portion of the adjacent waters had been established by the common assent of nations, these treaty arrangements would have been wholly superfluous. Each nation would have been bound, independently of treaty engagement, to respect the neutrality of the other in these waters as much as in its inland waters.

Two other groups of seventeenth and eighteenth century treaties and decrees of interest to our present inquiry relate, respectively, to the right of fishing and to the right of customs and sanitation control within various limits from the

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620. Similar language appears in the treaty of 1787 between France and Russia. *Id.* at pp. 521–522. A decree of the Prize Council of France in 1800 stated that "According to the law agreed upon by maritime Powers * * * it is established that a privateer can not be permitted any act of hostility * * * against an enemy vessel if this vessel is within a set distance of the territory of a neutral Power. This distance has been set at two leagues." *Id.* at p. 523. A decree of the National Assembly of France, November 22, 1790, relating to the public domain, provided that "navigable rivers and streams, waterfronts, beaches of the sea, ports, harbors, roadsteads, etc., and in general all portions of the national territory that are not susceptible of private ownership are considered as appurtenant to the public domain * * *." *Id.* at p. 699.

coast.[12] As regards these, it is sufficient to point out that none specify the cannon-shot or the three-mile limit, but greater distances; that, as may be implied from such fact, they are based on principles of jurisdiction and thus shed no light on the status of the proprietary theory.[13]

6. *By way of summary.*—The various decisions holding that California and other new States acquired property rights in their tidelands and lands beneath their bays, ports, harbors, rivers and other inland navigable waters, rest upon the "equal footing" clause in the statutes or compacts providing for the admission of such new States to the Union. See *supra,* pp. 69–70. The theory is that since the original States owned such lands and since the ownership of those lands is inextricably bound up with State sovereignty, the new States must acquire such lands in order to be on an "equal footing" with the original States. Accordingly, those decisions are wholly inapplicable

[12] See, e. g., Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942), pp. 27, 132; Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 32, 39.

[13] The Convention of 1839 between Great Britain and France appears to have been the first instance of agreement upon the three-mile limit as regards the exclusive right of fishing. See Crocker, *op. cit. supra,* p. 524, and Fulton, *The Sovereignty of the Sea,* (1911), pp. 612–614. Compare the convention of 1818, between Great Britain and the United States, which used the three-mile limit for the first time but did not speak in terms of exclusive right. Crocker, *op. cit. supra,* pp. 646, 647; see *id.* at 691.

here if it can be shown that the original States did not own the lands under the marginal sea at the time of the formation of the Union. And we have undertaken to show in Point III B that there was no such ownership at that time. When concrete property rights subsequently emerged, they emerged as rights of the national government through which they came into being. See *supra*, pp. 74–89.

As a background for the inquiry whether the original States owned the marginal sea during the period 1776–1789, it must be remembered that the three-mile belt itself had not yet become a reality in international law. True, some nations, notably Great Britain, had made sweeping claims to the ownership of entire oceans in the early 1600's. But these "vain and extravagant pretensions" [14] had gradually disappeared, and the theory of a marginal sea was an entirely new and different concept. See *supra*, pp. 26, 114. Its origin was in the writings of publicists, and it was not until 1782 that the Italian writer Galiani translated Bynkershoek's range of cannon into a distance of three miles. See *supra*, pp. 28, 120. Only in 1793 did the three-mile belt actually appear in international law: it did so under the sponsorship of the United States, and, even then, only as a neutrality zone, not as an area involving property rights. See *supra*, pp. 29–30, 128–134.

[14] *The Queen* v. *Keyn*, L. R. 2 Exch. Div. at 175.

With that background, the claims or absence of claims of the original States in their early constitutions and statutes are particularly significant. We have examined the constitutions and statutes of the original coastal States, and have found that in not one of them was there any boundary description or claim of ownership of any lands seaward of the low-water mark. Indeed, it was not until 1859 that Massachusetts projected her boundary to the three-mile limit. Similar action was taken for the first time by Rhode Island, New Hampshire, New Jersey, and Georgia (three English miles) in 1872, 1901, 1906, and 1916, respectively. New York, Delaware, Maryland, Virginia, North Carolina and South Carolina seem never to have claimed the marginal sea as being within their limits, either in their statutes or constitutions.

In addition, we have examined the colonial charters and grants of the Crown, and in none of them is there any reference to the marginal sea. In general, the eastern boundaries are described in such terms as "along the sea coast", and although there may have been broader language in a few of them with respect to the "seas adjoining", such language at most reflected the extravagant claims then current which subsequently disappeared.

Further confirmation of the absence of any clearly defined property interest in the marginal

sea at the time of the Revolution is the Treaty of Peace between the United States and Great Britain, concluded at Paris in 1783, which meticulously described the boundaries of the United States as running "to" the Atlantic Ocean. And a study of the English and American decisions of the period 1776–1789 reveals no cases in which the question of the ownership of the bed of the ocean is either discussed or resolved. Indeed, an opinion by Lord Chief Justice Cockburn makes clear that there was serious question in England, as late as the second half of the nineteenth century, as to whether the unappropriated bed of the sea below low-water mark was owned by the sovereign. See *supra,* pp. 47, 114–115. A contrary view attributed to Lord Hale, it must be remembered, was announced during the seventeenth century at a time when England was making its long-since abandoned claims to entire oceans.

Finally, we examined in greater detail the principles of international law as they stood at the time of the formation of the Union, and have shown that the concept of a proprietary interest in the bed of the marginal sea had not yet become established.

Accordingly, we submit that the original States cannot be regarded as having owned the bed of the marginal sea, and that, therefore, there is no basis for attributing such ownership to California under the "equal footing" rule.

C. IN ANY EVENT, THE EQUAL FOOTING RULE IS INAPPLICABLE BECAUSE OWNERSHIP OF THE SUBMERGED LANDS IS NOT AN ATTRIBUTE OF SOVEREIGNTY AT ALL WITHIN THE MEANING OF THE EQUAL FOOTING CLAUSE

In Point IIIA we contended that the equal footing rule is inapplicable to the three-mile belt on the ground that ownership of the submerged lands therein, if an attribute of sovereignty, is an attribute of national rather than local sovereignty. And in Point IIIB we argued that the equal footing rule is inapplicable here for the further reason that the original States did not own the lands within the three-mile belt at the time of the formation of the Union. Finally, in the alternative, we contend that the equal footing rule is inapplicable because the concept of ownership as an attribute of sovereignty within the meaning of the equal footing clause is unsound and should not be extended to the marginal sea. In making this contention we do not urge that the decisions applying the rule to tidelands and inland waters be overruled. Indeed we suggest that the Court reaffirm those decisions lest any doubts be permitted to arise as to the rights established by them. But we submit that the unsound rule of those decisions should not be extended to the marginal sea.

There is, of course, a strong public policy in favor of safeguarding property rights which have long been established by judicial decision even

though the decision upon reexamination may appear to be wrong. But there is no public policy in favor of extending an erroneous decision to new situations not heretofore adjudicated. This is particularly true in the case of the marginal sea. For, although there have been efforts during recent decades to exploit portions of the bed of the marginal sea, such portions have been relatively small and the great bulk of the vast area along hundreds of miles of coast remains as yet unexploited. If this area with its untold resources in fact belongs to the United States, every consideration of public policy would point to recognizing its hitherto unadjudicated rights. To the extent that there is any equity in the claims of those who erroneously thought that the tidelands and inland waters cases applied to the marginal sea, it might be appropriate for Congress to recognize such equity in some manner.[14a]

[14a] Indeed, the then Secretary of Interior, testifying before the Senate Judiciary Committee with respect to pending measures that would have quitclaimed these lands to the States, explicitly recognized that it would be appropriate for Congress to grant certain relief in the event that the Government should prevail in the present case. He said (Hearings, Senate Judiciary Committee, on S. J. Res. 48 and H. J. Res. 225, 79th Cong., 2d Sess., pp. 10–11):

"There will, in the first place, be appropriate occasion for relief legislation. In contrast with my friends from California, I do not pretend that the issue of ownership has ever been clear. Nor do I believe that anyone should be penalized for good faith reliance upon the State's claim of ownership. This involves at least two general principles.

"1. The States concerned and those who have operated

Cf. *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 32. But the possible existence of such an equity in so relatively an insignificant portion of the total area of the marginal sea can hardly be a reason for this Court's refusal to examine the correctness of the previously unadjudicated claims of the United States.

We turn, therefore, to a critical examination of the concept that ownership of submerged lands is an attribute of sovereignty within the meaning of the equal footing clause. As pointed out above, pp. 67–70, the cases treating the ownership of tidelands and lands under bays, harbors, and inland navigable waters as being incidental to State sovereignty have their source in and have been based largely upon *Martin* v. *Waddell*, 16 Pet. 367, and *Pollard's Lessee* v. *Hagan*, 3 How. 212.

In *Martin* v. *Waddell*, as we have seen, *supra*, pp. 67–68, the competing claims in an action of

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under State law should be relieved from any liability for damage in trespass for any past development of the submerged land. Specifically, neither should be required to account for oil or gas extracted before the date of the decision by the Supreme Court. Leases and contracts for operations on submerged lands outstanding when the present suit was filed in the Supreme Court should be continued in force and effect by the Federal Government, at least as to royalty rate and time limit.

"2. Structures, such as docks or piers, which may have been erected on the submerged lands and the surface ownership of filled-in areas should not be disturbed if they were erected or filled in accordance with the Federal or State law."

ejectment with respect to certain lands under Raritan Bay and River in New Jersey were based upon conveyances from the Proprietors of East Jersey and upon exclusive rights granted under a statute of the State of New Jersey. If the Proprietors had succeeded to the title of the Crown, the claim which was traced through them would have prevailed since it was prior in time to the grant by the State. But the Court held that the Proprietors had no title to give, since under the law of England these lands were held as a public trust and were thus an attribute of sovereignty which could not be the subject of a private grant. But, as Mr. Justice Thompson's dissenting opinion pointed out, the denial of such rights to the Proprietors was inconsistent with the very holding of the case which recognized the rights of those claiming under the State (16 Pet. at 419–420). For, the rights of the latter claimants depended upon a private grant by the State which was inconsistent with the concept that the lands were held in trust for the public. However, if it be said that the State was not subject to the same limitations as the Proprietors and held the submerged lands with full power to make any disposition thereof, it follows that ownership of such lands was no longer an attribute of sovereignty, and certainly not a necessary attribute of sovereignty, when they passed into the hands of the State. While the majority opinion contains a dictum, re-

lied upon in subsequent cases, that "when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use" (16 Pet. at 410), the context indicates that such was probably intended to mean, not that the title was an attribute of sovereignty in the sense of being held in trust as the King had held it, but that the people, being sovereign, owned all the vacant territory. That the Court considered the ownership of the people to be of a different character from that of the King appears affirmatively from its statement, immediately following the above dictum, that "A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual, in trust for the whole nation" (16 Pet. at 410–411).

Such was the background for the ruling in *Pollard's Lessee* v. *Hagan, supra,* and subsequent cases that since the King owned the tidelands and the submerged lands of the type there involved in his sovereign capacity as a public trust, and since, upon the Revolution, the original States succeeded to such ownership in their sovereign capacity, the new States upon their admission acquired the same sovereign rights as were possessed by the

original States in accordance with the principle of equality of States and the usual provision admitting the new States on an "equal footing" with the original States.[15] Probably the most extensive analysis of the question appears in Mr. Justice Gray's opinion in *Shively* v. *Bowlby*, 152 U. S. 1.[16]

This application of the equal footing rule is patently unsound. As successors to the Crown, the original States succeeded to the various public lands within their boundaries, yet it is undisputed that the new States did not automatically acquire any public lands, islands, or beds of non-navigable waters. See *supra*, pp. 64–65. Nor is ownership of the lands under navigable waters any more essen-

[15] Indeed, the majority opinion in *Pollard's Lessee* v. *Hagan* went further and placed the result, in part at least, upon constitutional grounds, holding that such lands would pass to the new States even in the absence of an "equal footing" provision and even if there had been an explicit provision reserving them to the United States (3 How. at 228). However, the error of this extreme view has since been recognized. See *Goodtitle* v. *Kibbe*, 9 How. 471, 478; *Shively* v. *Bowlby*, 152 U. S. 1, 28, 47–49, 58; *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 85; *United States* v. *Holt Bank*, 270 U. S. 49, 54–55. See also footnote, 3 How. at 223, Rapalje's notes, 2d ed., indicating that the Court has since overruled at least part of the theory that led it to the foregoing conclusion in *Pollard's Lessee* v. *Hagan*.

[16] See also *Mumford* v. *Wardwell*, 6 Wall. 423, 436; *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68; *Hardin* v. *Jordan*, 140 U. S. 371, 381; *Scott* v. *Lattig*, 227 U. S. 229, 242; *Donnelly* v. *United States*, 228 U. S. 243, 260; *United States* v. *Holt Bank*, 270 U. S. 49, 54–55.

tial to the exercise of a State's sovereign powers than its ownership of dry lands or beds of non-navigable waters. In all these situations, under our constitutional form of government, the traditional interests of the State focus upon the exercise of police powers and other sovereign powers that do not depend upon the ownership of the area over which jurisdiction is exercised. Indeed, the equal footing rule as applied in such circumstances has led to a bizarre distinction, whereby the lands under inland navigable waters are attributed to the States whereas the lands under non-navigable waters are attributed to the United States (*United States* v. *Oregon*, 295 U. S. 1, 14; *United States* v. *Utah*, 283 U. S. 64, 75; *Brewer Oil Co.* v. *United States*, 260 U. S. 77, 87; *Oklahoma* v. *Texas*, 258 U. S. 574, 591). If anything, the respective interests of the State and national governments lie in precisely the opposite directions. For, if ownership of the submerged lands is an attribute of sovereignty, it would seem that the non-navigable waters are primarily of local concern, whereas the navigable waters are of dominant concern to the national government. That the interest of the national government in the navigable waters, at least as to ports and harbors, is of prime importance was recognized in the legislation admitting the Republic of Texas to the Union, which specifically provided that Texas was to cede "to the United

States, all public edifices, fortifications, barracks, *ports and harbors,* navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence * * *" [italics supplied] (5 Stat. 797, Sec. 2).

The fallacy behind the rule that ownership is an attribute of State sovereignty is made even plainer upon considering that a new State would acquire no title to the tidelands or the beds of the inland navigable waters, if the United States, prior to admission, should choose to make some other disposition of such lands in promoting commerce or in the exercise of any other power committed to the Federal Government by the Constitution. Cf. *Shively* v. *Bowlby,* 152 U. S. 1, 28, 47–49, 58; *Goodtitle* v. *Kibbe,* 9 How. 471, 478; *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 85; *United States* v. *Holt Bank,* 270 U. S. 49, 54–55. And this Court has explicitly held that a prior grant of submerged lands in California by the Republic of Mexico will prevail over any claims of the State. *Knight* v. *U. S. Land Association,* 142 U. S. 161. Yet, if ownership of such lands were an "attribute of sovereignty" of the State which was necessary to place it upon an equality with all other States under our system of government, it would seem that such prior action could not defeat the basic rights of the State. The true answer is, of course, that ownership of sub-

merged lands is no more an attribute of sovereignty than is the ownership of any other kind of property.

Moreover, if there were any sound reason for treating the title as an attribute of sovereignty when first acquired by the States, one would suppose that the same reason would require it to be treated as an inseparable attribute. However, it must now be regarded as settled that the States may convey their title as they see fit, free of any public trust, subject only to the paramount powers of the Federal Government. *Weber* v. *Harbor Commissioners,* 18 Wall. 57, 66; *Port of Seattle* v. *Oregon & W. R. R.,* 255 U. S. 56, 63; *United States* v. *Holt Bank,* 270 U. S. 49, 54; *Appleby* v. *City of New York,* 271 U. S. 364, 381, 388–389; *United States* v. *Dern,* 289 U. S. 352, 354. Cf. *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387; *Mobile Transportation Co.* v. *Mobile,* 187 U. S. 479, 487; *Boone* v. *Kingsbury,* 206 Cal. 148, 186, appeal dismissed and certiorari denied, 280 U. S. 517; *City of Long Beach* v. *Marshall,* 11 Cal. 2d 609, 614–615. In actuality, then, the States, once they acquire title, unless they choose otherwise, hold it not as a public trust, but as a "full proprietary right." *Port of Seattle* v. *Oregon & W. R. R., supra.*

We may concede that the coastal States, except any which may have chosen otherwise, have territorial jurisdiction in the marginal sea and may exercise their police powers and other govern-

mental powers within that area, subject, of course, to any overriding power of the Federal Government.[17] See *Skiriotes* v. *Florida*, 313 U. S. 69, 75; *In re Humboldt Lumber Manuf'rs' Ass'n*, 60 Fed. 428, 432–433 (N. D. Cal.), affirmed, 73 Fed. 239, 246–247 (C. C. A. 9); *United States* v. *Newark Meadows Imp. Co.*, 173 Fed. 426 (S. D. N. Y.); *United States* v. *Carrillo*, 13 F. Supp. 121 (S. D. Cal.). But to say that the existence of such jurisdiction is inconsistent with the ownership of the United States is to ignore the broad distinction between jurisdiction and proprietary rights. Lands owned by the United States may be within the jurisdiction of the States within whose bound-

[17] The Federal power in this area has long been recognized, and has sometimes been assimilated to its constitutional authority over crimes committed on the "high seas." In *United States* v. *Smith*, 1 Mason 147, 148, 27 Fed. Cas. No. 16,337, pp. 1166, 1167 (C. C. D. Mass., 1816), where the defendant had been indicted for attempted revolt on the "high seas," Mr. Justice Story stated:

"Another question has arisen, whether the offence if committed at all, was in this case committed on the high seas. It appears, that the vessel at the time of the supposed offence was lying outside the bar of Newburyport harbour, but within three miles of the shore. Under these circumstances we are clearly of opinion that the place, where she then lay, was on the high seas; for it never has been doubted that the waters of the ocean, on the sea-coast, without low-water mark, are the high seas."

See also *Murray* v. *Hildreth*, 61 F. 2d 483 (C. C. A. 5); *Miller* v. *United States*, 88 F. 2d 102 (C. C. A. 9); *United States* v. *Griffin and Brailsford*, 5 Wheat. 184, 203–204; *The Kaiser Wilhelm Der Grosse*, 175 Fed. 215 (S. D. N. Y.).

aries they lie, except in such instances as exclusive jurisdiction may have been granted to the United States. *Bacon* v *Walker,* 204 U. S. 311; *Omaechevarria* v. *Idaho,* 246 U. S. 343; *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 650–652; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 141–142, 146–149; *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 197. And the "broad distinction between proprietary rights and legislative jurisdiction" with respect to navigable waters was expressly noted by Lord Herschell in *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces,* [1898] A. C. 700, 709. See also discussion by Chief Justice Shaw in *Commonwealth* v. *City of Roxbury,* 9 Gray (Mass.) 451, 494, 500–501.

It thus appears that the concept of ownership as an attribute of State sovereignty is a legal fiction which was adopted rather fortuitously for purposes of the so-called tideland rule only and which, being an unsound exception to the usual notion of property ownership, ought not to be extended now to apply to the marginal sea.

D. THIS COURT NEVER HAS HELD THAT THE STATES OWN THE MARGINAL SEA OR THE SOIL OR MINERALS THEREUNDER

In numerous cases commencing with *Martin* v. *Waddell,* 16 Pet. 367, 410, the Court has stated generally, in slightly varying language, that the several States, or the people thereof, own "their

navigable waters, and the soils under them,"[18] and the "soils under the tidewaters" within their borders;[19] it has also stated that new States have the same rights as the original States in "lands below the high water mark."[20] Included among these cases are several which involved the title to land in California.[21] However, an examination of the facts of all such cases reveals that *in each instance the issue before the Court concerned tidelands or lands under bays, harbors, arms of the sea, navigable rivers, or other inland waters, as distinguished from lands under the marginal sea.* Problems with respect to the ownership of the bed of the marginal sea had not yet reached the Court for adjudication, and it was probably merely fortuitous that the language employed, which was necessarily sweeping so as to include

[18] E. g., *Pollard's Lessee* v. *Hagan*, 3 How. 212, 229, 230; *Mumford* v. *Wardwell*, 6 Wall. 423, 436; *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68; *Scott* v. *Lattig*, 227 U. S. 229; *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 63; *United States* v. *Holt Bank*, 270 U. S. 49, 54; *Fox River Co.* v. *R. R. Comm.*, 274 U. S. 651, 655; *United States* v. *Oregon*, 295 U. S. 1, 14.

[19] E. g., *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65–66; *McCready* v. *Virginia*, 94 U. S. 391, 394; *San Francisco* v. *Le Roy*, 138 U. S. 656, 671; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 183; *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 435; *Shively* v. *Bowlby*, 152 U. S. 1, 57; *Appleby* v. *New York*, 271 U. S. 364, 381; *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 15.

[20] *Shively* v. *Bowlby*, 152 U. S. 1, 26.

[21] E. g., *Mumford* v. *Wardwell; Weber* v. *Harbor Commissioners; San Francisco* v. *Le Roy; Knight* v. *U. S. Land Association; Borax, Ltd.* v. *Los Angeles*, *supra*.

the various types of inland waters and tidelands, was also susceptible of an interpretation that would include lands under the marginal sea. But the opinions were not directed at lands in the marginal sea, and in some instances it could be as readily urged that the Court excluded them.[21]

So far as we have been able to discover, there have been only some two or three cases in which the Court has spoken directly with respect to the relationship between the States and the marginal sea. In neither *Manchester* v. *Massachusetts,* 139 U. S. 240, nor *Louisiana* v. *Mississippi,* 202 U. S. 1, were any rights in the marginal sea in issue and in neither is it clear that the Court even by the way of obiter dictum said that the States had title. A third case, *The Abby Dodge,* 223 U. S. 166, involved waters in the Gulf of Mexico adjacent to Florida, but no issue as to the possible claim of the United States to ownership of the bed of the marginal sea was either raised or decided. In view of the importance of the matter,

[21] Thus, in *Martin* v. *Waddell,* 16 Pet. at 411, 413, 414, 415, 416, the Court, speaking through Chief Justice Taney, refers to "the rivers, bays and arms of the sea", "the shores, and rivers and bays and arms of the sea, and the land under them", "the bays, and rivers and arms of the sea, and the soil under them", and "the rivers, bays and arms of the sea, and the soils under them". These expressions are used throughout the opinion synonymously with the term "navigable waters". No mention is made of the marginal sea. See also *Weber* v. *Harbor Commissioners, supra,* 65.

however, we shall comment more fully upon each of these three decisions.

1. In *Manchester* v. *Massachusetts,* 139 U. S. 240, the Court sustained the validity of an act of Massachusetts regulating fishing in Buzzard's Bay. Manchester, who had been convicted of violating the statute, attacked the conviction on the ground that the area in question was outside the jurisdiction of the State. The Court rejected that contention, holding that Buzzard's Bay was within the territory of the Commonwealth and that the territorial jurisdiction of a State includes the power to protect the fisheries in it, at least in the absence of legislation by Congress. Although the point was therefore not involved, the Court nevertheless remarked that "as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast" (p. 258), and that "the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation" (p. 264). At no time during the case was the title to the bed of the marginal sea in issue. The question concerned only the power of the State to legislate with respect to fisheries in waters wholly within the State, and the Court made plain its conclusion that Buzzard's Bay, which is merely an arm of the sea, "lies wholly within the territory of Massachusetts" (p. 256). And to the extent that the Court expressed any

opinion with respect to the three-mile belt, it was at most to the effect that the State has legislative jurisdiction within that area. We may concede that the State has legislative jurisdiction within the marginal sea (*supra*, pp. 4–5, 151–153), but such jurisdiction is no more indicative of proprietary rights than it is in the case of dry lands owned by the United States which are also embraced by the legislative jurisdiction of the State within whose boundaries they are located. Neither the decision nor the language of the opinion is inconsistent with the view that the bed of the marginal sea belongs to the United States.[22]

[22] While the Court in its opinion referred, *inter alia*, to *McCready* v. *Virginia*, 94 U. S. 391, a case which did not involve the marginal sea, in which the Court had said (at 394) that "the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running," it was careful not to hold that Massachusetts owned the waters or fish in Buzzard's Bay, much less in the marginal sea. Whether or not a State owns the fish within the marginal sea, its police power to regulate the means of taking them seems plain, at least in the absence of legislation by Congress. *Lawton* v. *Steele*, 152 U. S. 133, 136–139; *Bacon* v. *Walker*, 204 U. S. 311; *Omaechevarria* v. *Idaho*, 246 U. S. 343. Cf. *North American Com. Co.* v. *United States*, 171 U. S. 110, 134; *Silz* v. *Hesterberg*, 211 U. S. 31, 39. As regards the conduct of its own citizens, a State's power of regulation, like that of the United States, extends even to the open sea beyond the three-mile limit. *Skiriotes* v. *Florida*, 313 U. S. 69.

To the extent that the dictum in *Manchester* v. *Massachusetts* suggests that the State occupies the position of an "independent nation" in respect to international law, it is obviously at variance with other decisions of this Court, notably *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304. See discussion, *supra*, pp. 75–77.

2. *Louisiana* v. *Mississippi,* 202 U. S. 1, was a suit to determine the boundary between Louisiana and Mississippi in the waters of Lake Borgne and Mississippi Sound. The controversy was one as to the boundary between the two States through *inland navigable waters and arms of the sea only;* it did not involve the marginal sea or the open sea. Indeed, the Court's decree itself (202 U. S. 58) specified that the boundary line is "the deep water channel sailing line emerging from the most eastern mouth of Pearl river into Lake Borgne and extending * * * through Mississippi Sound, through South Pass * * * *to* the Gulf of Mexico * * *." [Italics supplied.] No question was raised or decided as to rights *in* the Gulf of Mexico. The Court noted particularly that the area involved, "the strip of water, part of Lake Borgne and Mississippi Sound, is not an open sea but a very shallow arm of the sea" (p. 52).[24] The very technique that the Court employed in fixing the boundary, namely, by application of the doctrine of the thalweg,[25] emphasizes the fact that the waters involved were inland waters, and not waters along the open coast.

[24] See also the Court's statement (p. 48) that "Mississippi's mainland borders on Mississippi Sound. This is an inclosed arm of the sea, wholly within the United States."

[25] In discussing the thalweg concept, the Court said (pp. 49, 50):

"If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep water channel.

"The term 'thalweg' is commonly used by writers on inter-

It is true that the Court thereafter stated (p. 52):

> The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester* v. *Massachusetts,* 139 U. S. 240; *McCready* v. *Virginia,* 94 U. S. 391.

But the reason for that statement or its relevance to the boundary issue then before the Court is not clear. Indeed, the Court simultaneously indicated that it had no relevance, for it stated (p. 52):

> Questions as to the breadth of the maritime belt or the extent of the sway of the riparian States require no special consideration here. The facts render such discussion unnecessary.

Thus, the reference to the marginal sea, if it be such, was purely obiter dictum, since the dispute

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national law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel.

* * * * *

"* * * we are of opinion that, on occasion, the principle of the thalweg is applicable, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea."

There was not the remotest suggestion that the doctrine of the thalweg could have any application (if it were logically possible) to any waters along the open coast.

722583—47——12

did not lie in the marginal sea, but in arms of the sea, as is clear from the Court's holding applying the doctrine of the thalweg (pp. 49–53). Moreover, neither the *Manchester* nor the *McCready* case supports the statement that the States "can exclusively reserve the fishery within their respective maritime belts for their own citizens", if "maritime belts" be construed to mean the marginal sea. Neither case involved the marginal sea and in the *Manchester* case the Court specifically refused to express an opinion as to whether the citizens of the United States have a common liberty of fishing in the navigable waters of the United States and as to whether Congress could regulate the fisheries in Buzzard's Bay (139 U. S. at 265, 266).

3. *The Abby Dodge*, 223 U. S. 166, involved an act of Congress which made it unlawful, under certain conditions, "to land, deliver, cure, or offer for sale" at any port in the United States sponges taken by means of diving apparatus "from the waters of the Gulf of Mexico or Straits of Florida." The action was begun by a libel against a vessel from which sponges were alleged to have been "landed" at a Florida port in violation of the statute (p. 172). The owner of the vessel attacked the constitutionality of the statute upon two grounds which were summarized by the Court as follows (p. 173):

> The *first* proceeds upon the assumption that the act regulates the taking or gather-

> ing of sponges attached to the land under water within the territorial limits of the State of Florida and it may be of other States bordering on the Gulf of Mexico, *prohibits internal commerce in sponges* so taken or gathered, and is therefore plainly an unauthorized exercise of power by Congress. The *second* is based on the theory that even if the act be construed as concerned only with sponges taken or gathered from land under water outside of the jurisdiction of any State, then its provisions are in excess of the power of Congress, because, under such hypothesis, the act can only apply to sponges taken from the bed of the ocean, which the National Government has no power to deal with. [Italics supplied.]

The Court concluded that the second contention was without merit and sustained the statute with respect to sponges brought in from areas beyond the territorial limits of the State. As to the first contention, however, it interpreted the statute as inapplicable to sponges taken from within the territorial limits of the State, since it thought that the statute might be unconstitutional if so applied.

No contention was made in that case that the United States owned the sponges within the three-mile belt. And since the first objection to the statute, as outlined by the Court, rested primarily upon the absence of any Congressional power to regulate "internal commerce", it would seem that

the Court's constitutional doubts can hardly be said to be a determination that the State, rather than the United States owned the bed of the marginal sea. It is true that the Court did refer to *McCready* v. *Virginia,* 94 U. S. 391, and *Manchester* v. *Massachusetts,* 139 U. S. 240, and that the Court in the *McCready* case did speak of ownership in connection with the regulation of fisheries within the inland waters of a State. But even the rule of those cases and the decision in *The Abby Dodge* must be read in the light of this Court's more recent opinion in *Skiriotes* v. *Florida,* 313 U. S. 69, which involved a Florida statute prohibiting the use of diving equipment in the taking of sponges "from the Gulf of Mexico, or the Straits of Florida or other waters within the territorial limits of the State of Florida," and in which Mr. Chief Justice Hughes stated (pp. 74, 75):

> If a statute similar to the one in question had been enacted by the Congress for the protection of the sponge fishery off the coasts of the United States there would appear to be no ground upon which appellant could challenge its validity.
>
> * * * It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State. * * *

In all the circumstances, we submit that the decision in *The Abby Dodge* cannot be regarded as an adjudication of competing *proprietary* claims of the State and the United States to the bed of the marginal sea.

IV

THE UNITED STATES IS NOT PRECLUDED FROM ASSERTING ITS RIGHTS IN THE LANDS INVOLVED IN THIS CASE

The central issue in this case is whether, under the applicable treaties, constitutional provisions, statutes, decisions, and the like, the rights to the lands within the three-mile belt are in the United States or the State of California. The State has presented its position in this regard by denying the Government's claim (Ans. 3–10) and affirmatively claiming title for itself (First Affirmative Defense, Ans. 10–13). In addition, the State has set forth various other contentions, which in one form or another seem to assert that the United States is precluded from seeking to establish its rights in this proceeding (Ans. 13–20). The defenses suggested by these allegations include estoppel or some related doctrine, laches, adverse possession, and *res judicata*. These contentions are amplified in the Appendix to the State's Answer (see supra, note 2, pp. 5–6) where over 700 pages are devoted to the details of specific instances in which the United States is said to have recognized the alleged rights of the State or in

which other matters are set forth calculated to support a conclusion that the United States should not be allowed to assert its rights at this time.

It is the position of the United States that these contentions cannot be sustained for at least two principal reasons. *First,* a careful examination of the material presented by the State fails to disclose any such pattern of long-continued and uniform acquiescense in its alleged rights, as is suggested by the State. The overwhelming majority of instances referred to by the State involve either tidelands or bays, harbors, rivers, and the like. The only instances clearly involving the three-mile belt are relatively few in number and in general represent merely isolated efforts to deal with a particular situation in a practical manner; they certainly do not reflect any general or long-continued policy of the United States with respect to ownership of the bed of the marginal sea. It is only in recent years that the problem has assumed major practical importance, and prior thereto attention had not been critically focused upon the issue. *Secondly,* apart from the State's failure to present a factual foundation for its contention, there is no legal basis for the application of an estoppel or any related doctrine against the United States in this case; nor is there any legal basis for the application of the doctrines of laches, adverse possession, or *res judicata.*

At the very outset, before analyzing the mate-

rial presented by the State, it is important to bear in mind that only relatively small portions of the marginal sea have been exploited or occupied. By far the greater portion of the hundreds of miles of coast is unoccupied or undeveloped in any way. If this vast area with its great potential resources in fact belongs to all the people of the United States, rather than to a more limited group, there can be no valid reason against giving effect to the rights of the United States. To the extent that there may be a genuine equity in the claims of those who erroneously thought that the so-called tideland rule applied to the marginal sea, it might be appropriate for Congress to recognize such equity in some manner. And indeed the former Secretary of Interior has affirmatively suggested to Congress that certain relief measures be enacted in the event that the United States should prevail in this suit. See *supra,* note 14a, pp. 144–145. But the possible existence of any equities in so relatively an insignificant portion of the total area of the marginal sea certainly should not preclude the United States from asserting its rights with respect to the area as a whole. (Cf. *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 32.)

A. THERE HAS BEEN NO ACQUIESCENCE BY THE UNITED STATES AS SUGGESTED BY THE STATE

The State's argument that there has been a long course of acquiescence in its alleged title to the bed

of the marginal sea rests primarily upon allegations as to: (1) acceptances by certain officers of the United States of grants and cessions of title to, or leases, easements or other interests in, "tide and submerged lands" from the individual States to the United States (Ans. 14; App. 89–440, 529–739); and (2) decisions or rulings of various branches of the Federal Government (Ans. 14–15; App. 441–527). We shall examine each of these allegations separately and shall undertake to show that they do not in fact disclose any such established practice or uniform treatment by the United States with respect to title to submerged lands in the marginal sea as would justify a conclusion that the United States has recognized or acquiesced in the alleged ownership by California.

1. *The alleged acceptance of grants or cessions from the States.*—Approximately 560 pages of the Appendix to the Answer are devoted to the discussion of some 195 instances in which some department or officer of the United States has participated in a transaction whereby some interest in tide or submerged lands has passed from a State to the United States, either by gift or purchase or by condemnation. (App. 89–440, 529–739.) For the convenience of the Court there is included herewith in Appendix B, *infra*, pp. 227–258, a summary analysis of these transactions.

In that analysis we have undertaken to clas-

sify these transactions with respect to the location of the areas involved. Of the total number discussed by the State, approximately 159 are transactions involving lands which are clearly tidelands or lands under inland waters. Of the remaining 36, there are 22, which, out of an abundance of caution, may be classified as "doubtful", but are probably under inland waters.[26] Consequently, of the total of 195 instances listed, covering transactions in every coastal State in the Union, only 14 relate to lands that are clearly under the marginal sea, and of those 14, only 5 in-

[26] Thus, included among the 22 "doubtful" situations are 14 transactions which involve lands situated in the harbors of Long Beach and Los Angeles (App. 186–305) and are well within the area described by the State as constituting San Pedro Bay (App. 223–224). This area has been held to be inland waters and not within the three-mile belt. *United States* v. *Carrillo*, 13 F. Supp. 121 (S. D. Cal.).

Also included in this classification are the four tracts at Santa Barbara, which were transferred to the United States for use as a Naval Reserve Armory and Section Base by virtue of one fee simple deed and three temporary use permits executed by the city in 1942 (App. 326–336). The lands embraced in these instruments were formed by accretions to the shore line west of the Santa Barbara breakwater between the date of its completion in 1930 and the year 1937 (H. Doc. 552, 75th Cong. 3d Sess., pp. 8–9, 12–15). Since these accretions were gradual extensions seaward of State owned tidelands, the area covered by these transactions should probably be classified as tideland and therefore of a type not involved in this proceeding. Cf. *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66–69.

volve lands adjacent to California. All 14 are listed in the footnote,[27] and will be discussed below.

Thus, the State's reference to the large number of transactions involving tidelands and other lands not in controversy herein serves only to foster a misleading impression as to the nature and extent of the so-called recognition of the State's title by the United States.[28] Such transactions obviously

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[27] Those 14 instances are as follows: (1) Submerged lands in front of the Military Reservation, Pt. Loma, San Diego Harbor (App. B, *infra*, p. 227); (2) Zuninga Shoal tract, San Diego Harbor (App. B, *infra*, p. 227); (3) Submerged lands in front of Lime Point Military Reservation, San Francisco (App. B, *infra*, p. 227); (4) Unloading docks, Catalina Island (App. B, *infra*, p. 230); (5) Newport Bay, California, jetties (App. B, *infra*, p. 232); (6) Submerged lands in front of Ft. Canby, Washington (App. B, *infra*, p. 244); (7) South jetty, Galveston, Texas (App. B, *infra*, p. 246); (8) North jetty, St. Johns River, Florida (App. B, *infra*, p. 248); (9) Spoil area, Crystal River, Florida (App. B, *infra*, p. 248); (10) Georgetown jetties, Winyah Bay, South Carolina (App. B, *infra*, p. 249) and (11), (12), (13) and (14), Submerged lands adjoining Ft. Moultrie Military Reservation, Sullivan's Island, South Carolina (App. B, *infra*, p. 249).

[28] Some of the transactions listed in the Appendix to the Answer appear to involve lands under the open sea when in fact they do not. An example is the 24.25-acre tract acquired for the construction of a breakwater at the entrance to Humboldt Bay, California (App. 141–144). It is alleged that this acquisition covered "tide and submerged lands lying in the Pacific Ocean at the entrance to Humboldt Bay." However it would appear from the description of the area acquired, as set forth in the Act of the California Legislature of March 15, 1889 (Stats. 1889, p. 201), that the tract extended at most only 9 chains (594 feet) below high-water mark, whereas the distance between high- and low-water marks at the South Spit in the year 1889 was 700 feet. Ann. Rep.,

have no bearing upon any alleged recognition of title to submerged lands in the marginal sea.

It may be admitted, however, that the State has cited 14 transactions which do appear to involve lands under the open sea. Since they relate to lands of the type involved in this proceeding, these 14 items warrant some discussion in order that it may be shown that the actions described do not

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Chief of Engineers, 1890, p. 2920. Consequently, no lands beyond low water mark seem to have been involved.

Another such instance was the Act of the Legislature of Mississippi (Laws, 1858–59, p. 49) purporting to convey Ship Island to the United States (App. 612–613). This Act was in effect no grant at all. The language therein, covering the "contiguous shores, flats and waters" within 1,760 yards of low-water mark, was merely a cession of jurisdiction, whereas the language purporting to grant to the United States the State's right, title and claim to Ship Island covered only the island itself. However, the State had no ownership in the island which it could grant, since the island was already owned by the United States, having been public land reserved as a military reservation by the Executive Order of August 30, 1847. The Act of the Legislature of Mississippi of April 26, 1940 (Laws, 1940, p. 556) was an attempt to define the area purportedly quitclaimed to the United States in 1858. It was part of an effort to increase the size of the reservation so as to include the contiguous submerged lands for the benefit of an American Legion Post to which the reservation proper was conveyed pursuant to the Act of Congress of June 15, 1933 (48 Stat. 150). In an opinion dated May 27, 1940 (War Dept. file: JAG 601.01), the Judge Advocate General of the Army ruled that the 1940 Act of the Mississippi Legislature could not have the effect of so enlarging the military reservation, and that a conveyance of the contiguous submerged area would not be valid under the above mentioned Act of Congress.

constitute such recognition of the State's claim to the lands in the marginal sea as to reflect any established practice or uniform treatment in regard to such lands.

The first three transactions involved tracts of submerged lands at Pt. Loma and Zuninga Shoal, near San Diego (App. 93, 95), and at Lime Point, San Francisco Harbor (App. 99), which apparently passed to the United States by virtue of the Act of the California Legislature of March 9, 1897 (Stats. 1897, p. 74).[29] The Act purported to grant, release and cede to the United States the right and title of the State in and to all lands out to a line 300 yards beyond low water mark adjacent to lands of the United States within the State lying upon tidal waters and held for military purposes (App. 93–117).[30] The records of the War Department reveal that this legislation was requested on the recommendation of an Army officer in the Engineer Office, San Francisco, in connection with the proposed construction

[29] A total of seventeen tracts passed to the United States under that statute, and all seventeen are described and relied upon by the State in the Appendix to its Answer (pp. 91–117). However, only three of the seventeen tracts, those mentioned above, contained any lands located in the marginal sea (see Appendix B, *infra*, pp. 227–229).

[30] This Act required no act of acceptance on the part of any official of the United States. It is alleged in the Appendix to the Answer (App. 93) that 17 different maps indicating the areas involved were filed with the Surveyor General of California by local officers of the War Department. It is true that some of the maps referred to apparently contain

of certain defense facilities on State tidelands adjacent to certain military reservations in San Francisco Bay.[31] When the formal request was prepared, however, it was deemed appropriate to include also the submerged lands in front of all other military reservations in California bordering on tidal waters.[32] And as thus enacted, the

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notations indicating that they were filed pursuant to the Act of March 9, 1897. However, notwithstanding these notations, the Act of March 9, 1897, required no such action. The filing of such maps was required by the Act of March 2, 1897 (Stats. 1897, p. 51), which was an entirely different statute ceding jurisdiction over *all* lands, within the State, held, occupied or reserved by the United States for military purposes; it made no provision whatever in regard to the title to such lands. Although there may have been some understandable confusion in this regard, the filing of the maps had nothing to do with any purported transfer of title under the Act of March 9, 1897.

[31] In what appears to be the first action dealing with the matter, which was a letter from Colonel G. H. Mendell, to the Chief of Engineers, dated March 4, 1890 (War Dept. file: Cal., Presidio of S. F., Jur. #1), there appears the following statement:

> I allude to the matter in connection with the construction of torpedo casemates and cable galleries contemplated at a number of points in this harbor, the latter of which necessarily cross the interval, great or little, between high and low water tidal marks, the fee to which lies in the State.

[32] This also was recommended by Colonel Mendell. His letter of December 31, 1890, to the Chief of Engineers (War Dept. file: Cal., Presidio of S. F., Jur. #1) contains the following:

> It is recommended that the projected Act be made general in its terms, to include all tracts of land on tidal waters in the State now held by the United States for

statute was utilized with respect to 17 separate tracts. See *supra,* note 29, p. 170. However, of the 17 tracts involved, only 3 consisted of lands situated in the open sea and the Act in substance merely authorized a *quitclaim* of such interest as the State might have in the lands.

Other transactions among those involving lands under the open sea were also quitclaim in nature, purporting to convey only whatever interest the respective States may have had in the lands therein described. Such were the grants covering the two jetties at Georgetown, Winyah Bay, South Carolina, as expressed in section 2042 (36) of the South Carolina Code (App. 653), and those embracing four tracts adjoining Fort Moultrie Military Reservation, as set forth, respectively, in sections 2042 (37), 2042 (38), 2042 (41) and 2042 (45, 46, 53, 54) of the South Carolina Code (App. 654, 655, 656, 657).

Of this same nature was the grant made by the State of Texas in 1912, which included in its description the south jetty at Galveston (App. 592–594).[33] This grant had no relation to the

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defensive purposes, or that may in future be acquired by the United States for defensive purposes, and that the State be asked to surrender to the United States its right and title to submerged lands adjacent to these tracts, extending from high water mark to a distance 300 yards beyond low water mark.

[33] The patent executed by the Governor of Texas, No. 47, dated June 28, 1912, purported to grant "all the right and title" of the State in and to the lands described.

construction of the south jetty, which was considered completed in 1897 (H. Doc. 328, 61st Cong., 2d Sess., p. 7). It was requested and accepted by the United States to resolve certain conflicting claims to lands situated within the Fort San Jacinto Military Reservation on the northeastern tip of Galveston Island, from which the south jetty extends eastward into the Gulf of Mexico. The military reservation had been the property of the United States since the admission of Texas to the Union by virtue of section 2 of the Joint Resolution of Annexation adopted March 1, 1845 (5 Stat. 797). However, severe storms occurring from time to time resulted in erosions and accretions which materially changed the topography of the area, particularly as to certain tidelands within and adjacent to the military reservation. Sometime subsequent to 1889, certain individuals attempted to locate upon these tidelands as vacant public lands of the State of Texas. Following a severe storm in 1900, it was proposed that the United States construct a sea wall around certain portions of the tip of the island, it being feared that the erosion incident to another such storm might result in the cutting of a channel completely across the neck of the island (H. Doc. 1390, 62nd Cong., 3d Sess., pp. 21–23). A special board appointed by the War Department recommended that the project be undertaken "contingent on a satisfactory cession to the United States, free of cost, of

all land east and north of a line originating at the intersection of the center line of the south jetty with the present southern boundary of the Fort San Jacinto Reservation and extending thence approximately S. 16° E. to the Gulf of Mexico * * *" and "upon the quieting of any claims that may be outstanding to the present Fort San Jacinto Reservation," as well as upon local construction of a portion of the sea wall in front of city property (H. Doc. 1390, 62d Cong., 3d Sess., p. 6). The quitclaim patent issued by the State of Texas in compliance with this condition covered not only the military reservation and a triangular area on the southerly side thereof (neither of which was located in the marginal sea), but also the jetty extending eastward from the island, together with "all accretions and all tide lands" contiguous to the lands described. As heretofore indicated, the existing south jetty had no connection with the negotiations leading up to this grant. However, the very obvious purpose of including the jetty with the lands to which title was to be quieted was to remove all doubt as to the title to any tidelands which by accretion might subsequently be formed adjacent to the jetty, particularly at the point where it joins the military reservation.

The area in front of Fort Canby, Washington (App. 544–551), and the spoil area at Crystal River, Florida (App. 639), are situated partly in inland waters and partly in the open sea. The

transactions involving these areas did not purport to transfer title to the United States. In the one case the supposed grant by the State of Washington covered merely the use of any tide and shore lands adjacent to uplands held by the United States for public purposes (Sess. Laws 1889–90, p. 263; 1909, p. 390), and in the other the Trustees of the Internal Improvement Fund of the State of Florida issued a permit to the War Department to deposit in certain places the material to be dredged in connection with the improvement of the entrance channel to Crystal River as an aid to navigation. As to the latter, it seems plain that the United States, in the interests of navigation, could have conducted such dredging operations and could have deposited the dredged material in navigable waters without State authority, and regardless of the condition of the title of the underlying lands. Cf. *South Carolina* v. *Georgia,* 93 U. S. 4, 10–11; *United States* v. *Commodore Park,* 324 U. S. 386, 392–393. Accordingly, it is not clear why such a permit was accepted by the War Department, and its significance is doubtful at best.

The conveyance of a tract of land near the mouth of the St. Johns River, Florida, including the north jetty (App. 631) purported to transfer to the United States a fee simple title, subject to certain reservations. However, the background of this transaction reveals that it consti-

tutes no part of any established policy in regard to the ownership of land under the open sea. The deed was accepted as a solution to a problem arising by virtue of the circumstances in this particular case.

The construction of the north jetty was begun in 1880 and completed to full distance seaward and height in June, 1904 (H. Doc. 611, 61st Cong. 2d Sess., p. 12),[34] the jetty being anchored to and partially located upon an island near the mouth of the river. In fact, that portion of the jetty which is situated on this island extends landward from high water mark for a distance of approximately 7400 feet, 1700 feet thereof being on land not covered by the conveyance; the remaining portion of the jetty extends seaward for a distance of approximately 7250 feet beyond high water mark (see map, App. 632). Several years prior to 1929, private interests owning adjacent lands constructed an automobile highway along the north bank of the St. Johns to the inner end of the jetty. Gradual silting and the deposit of spoil dredged from the channel resulted in a considerable accretion to the island, particularly on the north side of the jetty. As the area above high water mark increased, there were numerous efforts by private interests to locate upon and

[34] Certain minor constructions, involving restoration and additions to the height near the outer end, continued until 1913. H. Doc. 483, 70th Cong., 2d Sess., p. 22.

claim the accreted lands. In order to avoid this undesirable situation it was felt that title should be acquired to the adjacent tracts on each side of the jetty. In this way, as the accretions moved seaward, title to the newly formed upland and *tideland* area adjacent to the jetty would be in the United States. The State authorities were in accord with such a plan, and it was determined that the most feasible method would be to accept from the State a conveyance to an area on each side of the jetty and record the same in local county records. Accordingly, on February 26, 1929, a quitclaim deed was executed by the Trustees of the Internal Improvement Fund of the State of Florida. On December 28, 1938, there was substituted for this quitclaim deed the purported fee simple deed referred to by the State of California (App. 631). The descriptions in the two instruments are identical.

The deeds accepted by the United States in connection with the extension of the jetties at the entrance of Newport Bay, California (App. 169–183), also purported to convey a fee simple title to the lands under the said jetties, but here, too, the situation was governed by circumstances peculiar to the particular project. Originally, Newport Bay was a shallow sound capable of accommodating only small craft. Its improvement as a yacht basin and anchorage was urged by local

interests as far back as 1922 (War Dept. File: 7245 (Newport B., Calif.) 22). On May 2, 1934, under the provisions of the National Industrial Recovery Act of 1933, a Public Works allotment of $915,000 was made to the War Department for the improvement of Newport Bay Harbor by the construction and extension of jetties and the dredging of the entrance channel, inner channels, yacht anchorage and the remainder of the bay, provided local interests should contribute an equal sum as one-half the cost of the improvement and furnish free of cost to the United States all necessary rights of way and disposal areas for the dredged materials. Pursuant to this authority, the project was undertaken by the War Department and incident thereto the City of Newport Beach executed and delivered to the War Department five warranty deeds and a disposal permit. Only two of the deeds, those covering the lands under the entrance jetties, extended to any area below ordinary low-water mark along the open coast,[35] and it seems probable that these deeds were accepted merely out of an abundance of caution in meeting the conditions stated in the allotment of the Public Works funds.

Finally, two of the matters relating to lands in

[35] The language of the disposal permit (War Dept. file: 7245 (Newport B., Calif.) 56/6) indicates that it actually covered only tidelands and upland belonging to the City.

the marginal sea involved no transfer of any title or interest to the United States. One of these involved unloading docks at Catalina Island (App. 146–154) erected under easements granted by the State in 1941 to a private construction company having a contract with the War Department. The other related to a salt water return pipe line at El Segundo, Santa Monica Bay, California (App. 154–156). This pipe line, which was installed by the Standard Oil Company in 1943 under an easement from the State, was required in connection with the operation of a synthetic rubber plant under a contract with the Defense Plant Corporation. It is alleged (App. 156) that this easement vested immediately in the Defense Plant Corporation. However, the records of that agency indicate that the easement was not assignable and no interest therein passed to the Defense Plant Corporation. Moreover, the easements in both situations were probably taken out of an abundance of caution, in the interest of expediting the defense program, rather than as a result of a studied conclusion that the areas were owned by the State.[35a]

The relatively detailed discussion contained in the foregoing paragraphs has been included for the purpose of illustrating that even in the comparatively few instances in which grants or cessions of some interest in lands under the open sea have

35a Indeed, we have classified the El Segundo transaction in the "doubtful" category (see *infra*, p. 231), but it is discussed above because of its similarity to the Catalina Island transaction.

been accepted by officers of the United States there has been no uniformity of treatment or policy which would in any manner support the sweeping contention made by the State in respect to recognition of its alleged title to said lands. The transactions discussed did not represent and were not governed by any established practice. Apart from the fact that a majority of these transactions involved only quitclaim deeds to the United States,[36] it is important to note that the action taken by the officers of the United States was usually motivated by a desire to solve some problem arising out of the peculiar circumstances surrounding a particular project. Thus, there were involved such unique problems as the presence of squatters on the accreted lands adjacent to the north jetty at the mouth of the St. Johns River, the attempted locations on tidelands near the south jetty at Galveston, and the situation existing at Newport Bay, where the purpose of the improvement was to provide anchorage for yachts and pleasure craft, one-half of the cost being contributed by local interests. In such cases, it seems safe to assume that the officers of the United

[36] The acceptance of a grant does not necessarily constitute a recognition of title, since, as a general principle, the grantee under any deed of conveyance is not estopped to deny the title of his grantor. *Blight's Lessee* v. *Rochester*, 7 Wheat. 535, 547–548; *Watkins* v. *Holman*, 16 Pet. 25, 53–54; *Merryman* v. *Bourne*, 9 Wall. 592, 600; *Bybee* v. *Oregon & California R'd Co.*, 139 U. S. 663, 681–682.

States, when accepting the deeds in question, did so more out of an abundance of caution than out of any thought or policy in regard to a recognition of State title to the lands involved. Certainly this would seem to be so where conveyances were accepted in connection with projects for the improvement of navigation, such as the dredging of channels and the erection of jetties, since in these cases it is not necessary for the United States to acquire *any* title, even in lands underlying inland waters.[37] Furthermore, in some of the cases of this type cited by the State the project was sub-

[37] *Scranton* v. *Wheeler*, 179 U. S. 141, 162–165; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 88. See also *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596–597. This same principle applies to lands under navigable waters acquired for lighthouse purposes. *Hawkins Point Light House Case*, 39 Fed. 77, 87–88 (C. C. D. Md., 1889), reversed on other grounds *sub nom. Chappell* v. *Waterworth*, 155 U. S. 102, but cited with approval in *Lewis Blue Point Oyster Co.* v. *Briggs*, *supra*, at p. 88. Cf. *In re Lighthouse at Hell Gate*, 196 Fed. 174, 175 (S. D. N. Y., 1912), affirmed *sub. nom. Lawrence Ward's Island Realty Co.* v. *United States*, 209 Fed. 201, 202 (C. C. A. 2).

In this connection, it is interesting to note that the State makes no mention of the south jetty at the mouth of the St. Johns River or the north jetty at Galveston. These jetties were constructed almost contemporaneously with those referred to by the State and extended equal distances into the marginal sea (see H. Doc. 611, 61st Cong., 2d Sess., p. 12; H. Doc. 328, 61st Cong., 2d Sess., p. 7). It does not appear that officers of the United States have ever accepted any grants or cessions of the lands upon which these adjacent jetties are situated.

stantially or entirely completed in advance of any acceptance of a purported conveyance of title.[35]

The above considerations clearly indicate that in the fourteen instances cited by the State involving lands under the open sea the officers of the United States accepting grants or cessions of some interest in such lands were not following or establishing any uniform policy or practice in regard to recognition of State ownership in such lands. In each instance these officers were motivated primarily by the exigencies of the situation confronting them. Consequently, the actions referred to do not support the State's sweeping allegations regarding recognition or uniform treatment by the United States in respect to the State's claim of title to lands of the type here involved.

2. *The alleged rulings by the various branches of the Federal Government.*—In addition to the extensive allegations as to acceptances of grants or cessions by the United States, the State has set forth in the Appendix to its Answer (pp. 441–527) a number of references to decisions and rulings by the various branches of the Federal

[35] As hereinbefore indicated, the north jetty at the mouth of the St. Johns River, Florida, was completed in 1904 (H. Doc. 611, 61st Cong., 2d Sess., p. 12), while the deed referred to by the State (App. 631) was executed in 1938. The patent for the south jetty at Galveston, Texas, was executed in 1912 (App. 592), although the jetty was considered completed in 1897 (H. Doc. 328, 61st Cong., 2d Sess., p. 7).

Government with respect to tide and submerged lands. Many of the instances referred to in this connection were the identical transactions involved in the alleged acceptances of grants or cessions by the United States, and, many of them, involving only tidelands or inland waters as they do, are irrelevant as shown above.

However, it may be helpful to examine the allegations in the context in which they are made. The State apparently seeks to establish a practice on the part of the three branches of the Federal Government, judicial, legislative, and executive.

(a) *Judicial branch.*—The State refers to various decisions of the Federal courts (App. 442–446) as instances of acquiescence in its alleged title by a coordinate branch of the Federal Government. Passing the question whether judicial decisions could have the effect which the State wishes to ascribe to them in this connection, it is clear that the decisions referred to afford no support for its position.

The cases of *Bankline Oil Company* v. *Commissioner of Internal Revenue,* 90 F. 2d 899 (C. C. A. 9), reversed in part, affirmed in part, 303 U. S. 362, and the companion cases of *Spalding* v. *United States,* 17 F. Supp. 957 (S. D. Cal.), affirmed, 97 F. 2d 697 (C. C. A. 9), certiorari denied, 305 U. S. 644, and *Spalding* v. *United States,* 17 F. Supp. 966 (S. D. Cal.), reversed, 97 F. 2d 701 (C. C. A. 9), certiorari denied, 305 U. S.

644, were controversies involving the liability of lessees of the State of California for the payment of Federal income taxes on moneys received from the production of oil from offshore lands. It is true that the lands involved in these cases were situated under the open sea, but the question of title thereto was not in issue and was not decided. These cases hold merely that, assuming the lands to be owned by the State,[39] the income accruing to the lessees is not constitutionally immune from Federal taxation.

The case of *Boone* v. *Kingsbury,* 206 Cal. 148 (1928), is the California Supreme Court's interpretation of the State's constitution and laws in regard to the right of the State to lease its submerged lands for the production of oil. An attempt was made to bring the case to this Court, but certiorari was denied and an appeal was dismissed for want of a substantial federal question. *Workman* v. *Boone,* 280 U. S. 517. The United States was not a party to this suit and the issue as to whether the United States or the State owned the lands involved was not before the Court.

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[39] In the *Bankline* case upon which the court relied in the *Spalding* cases, this Court declared, "We assume, for the purposes of this case, as it was assumed below, that the lease was of tidelands owned by the State." *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 369.

In *Dean* v. *City of San Diego,* 275 Fed. 228 (S. D. Cal. 1921), another proceeding to which the United States was not a party, there were involved only lands under the waters of San Diego Bay, and not any lands under the open sea.

The eight decisions of this Court which, it is alleged (App. 446), hold that the State of California is the owner of all tide and submerged lands within its borders have been included among those cases cited by the State in connection with its First Affirmative Defense. The rationale and scope of all such cases have been considered in Point III, *supra.* Since they all involve lands under inland waters, they obviously constitute no basis for the State's contentions in regard to recognition of ownership in lands under the open sea.

(b) *Legislative branch.*—Equally ineffective is the State's attempt to point to any Congressional recognition of the alleged title of the State to the lands here involved. (App. 447–451.) The State first seeks to find evidence of such recognition in the fact that the Congress has never enacted legislation providing for the disposal of any tide or submerged lands. The fallacy of this negative argument is readily apparent. The fact that the Congress has not seen fit to convey away any interest in such lands does not necessarily imply that it does not consider such lands to be owned by the United States, and it certainly does not

constitute a positive recognition of title in another.

There are comparable situations in the history of this country that furnish ample precedent here. As pointed out more fully, *infra*, pp. 211–213, virtually all mining operations in the western States were conducted for some years without statutory authority by private individuals on lands owned by the United States. The so-called Gold Rush is familiar history. Indeed the practice was acquiesced in by the United States for a long time prior to the assertion by Congress of the rights of the United States in these lands. True, Congress at the same time recognized certain private equities that had meanwhile accrued but the important consideration was that Congress could at that later time assert the rights of the United States with respect to the entire public domain, unembarrassed by its prior tacit acceptance of the private exploitation of this country's mineral lands. Another example is the acquiescence in the long use of the forest reserves and the public domain for grazing purposes by the livestock industry, followed many years later by the Congressional revocation of the implied license for pasturage purposes. See *infra*, p. 213.

The inaction of Congress in the present situation is of no greater significance. Although there may have been sporadic use of underwater lands for some time, the matter has become one of major concern only in recent years. Indeed, it was not

until 1921 that California enacted its legislation providing for the leasing of the offshore oil lands (see *supra*, p. 3), and it was not until some years later, after litigation in the State courts,[40] that the State undertook to issue leases generally with respect to such lands.[41] It cannot be said that there was an unreasonable lapse of time prior to Congressional attention in regard to this matter. In 1937, the Senate acted favorably upon a Joint Resolution which asserted the rights of the United States to such submerged lands as are involved herein (S. J. Res. 208, 75th Cong., 1st Sess., passed August 19, 1937, 81 Cong. Rec. 9326), and it was favorably reported with certain amendments, by the House Judiciary Committee (H. Rep. 2378, 75th Cong., 3d Sess.; reported May 19, 1938, 83 Cong. Rec. 7178) but was not acted upon by the House itself. On the other hand, a Joint Resolution quitclaiming rights of the United States in this area was passed by Congress during the past year, but it was vetoed by the President (H. J. Res. 225, 79th Cong., 2d sess.; vetoed August 1, 1946, 92 Cong. Rec. 10803–

[40] *Boone* v. *Kingsbury*, 206 Cal. 148, appeal dismissed and certiorari denied *sub nom. Workman* v. *Boone*, 280 U. S. 517.

[41] However, subsequent measures (Cal. Stats. 1929, pp. 11, 944) prohibited the granting of further leases, while protecting the rights of those who had already applied for permits or leases. Thereafter, in the "State Lands Act of 1938" (Cal. Stats. Ex. Sess. 1938, p. 23) the leasing of such lands was again authorized, subject to specified conditions (secs. 85–94). See California Public Resources Code, Secs. 6871–6878.

10804). Thus, Congressional concern in this regard during the past decade indicates that any judgment with respect to Congressional action or inaction is wholly inconclusive.

The State lists four Acts of Congress (App. 449–451), which, it is alleged, assert and declare that the State of California and its grantees are the owners of tide and submerged lands within the limits of the State. These enactments are (1) the Act of July 25, 1912 (37 Stat. 201, 220), providing for an exchange of two 9.75-acre tracts in San Pedro Bay, that to be conveyed by the United States as its part of the exchange being a portion of the 300-yard strip around Deadman's Island in Los Angeles harbor, which was tranferred to the United States by the Legislature of California under the Act of March 9, 1897 (Stats. 1897, p. 74); (2) the Appropriation Act of March 3, 1925 (43 Stat. 1186, 1189) approving a report recommending a similar proposed exchange involving Reservation Point and a part of the same area around Deadman's Island; (3) the Act of June 2, 1939 (53 Stat. 798, 800) relating to the acquisition of lands in Oakland harbor for use as a naval supply depot; and (4) the Joint Resolution of July 9, 1937 (50 Stat. 488, 490–491) relative to Treasure Island in San Francisco Bay. All four of these measures relate to lands situated in either a bay

or a harbor. Indeed, three deal with the identical lands which the State included among the alleged acceptances of interests in submerged lands by officers of the United States (see App. 262, 272, 366, respectively), and which we have already disposed of in our discussion of that portion of the Appendix to the State's Answer. Any recognition by the Congress of State ownership of these lands certainly would not constitute a similar recognition of such ownership as to lands situated under the open sea.

(c) *Executive branch.*—In support of its allegations in regard to rulings and decisions by the executive branch of the United States Government holding or declaring the title to submerged lands to be in the respective States, reference is made to some 7 title opinions rendered by the Attorney General or his subordinates (App. 452–459), some 28 decisions of the Department of the Interior (App. 460–503), and some 10 instances involving reports of, or action taken by, various officers of the War and Navy Departments (App. 504–527).

The seven title opinions attributed to the Attorney General all relate to transactions previously discussed with respect to the acceptance of grants or cessions by the United States.[41a] Only

[41a] These seven opinions relate to the following lands: (1) Tide and submerged lands adjacent to North Island, San Diego (App. 117–131), although it is not clear from the

one of the matters involved lands clearly under the open sea, namely, the acquisition of lands at the entrance to Newport Bay, California, which has been considered above, *supra*, pp. 177–178, and in this instance no title opinion as required by

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State's allegations that an opinion was actually rendered in this instance; (2) the South Spit at the entrance to Humboldt Bay (App. 141–144); (3) tide, submerged and overflowed lands adjacent to Mare Island, in San Francisco Bay (App. 160–163); (4) tide and submerged lands at the entrance to Newport Bay (App. 171–183); (5) artificial accretions to Terminal Island, in Los Angeles Harbor, San Pedro Bay (App. 233–234), an opinion rendered by the United States Attorney and not the Attorney General; (6) an exchange of 9.75 acres of lands situated in Los Angeles Harbor, San Pedro Bay (App. 261–269); and (7) a similar exchange of 61.98 acres in the same harbor (App. 269–283).

Elsewhere in the Appendix to its Answer the State refers to other opinions of the Attorney General rendered in connection with certain grants from States to the United States. These opinions relate to the following matters: (1) a site for a custom house at San Francisco (App. 157–160); (2) rights in and to Peacock Spit, in the Columbia River, adjacent to Fort Canby, Washington (App. 543–551); (3) submerged lands at Naval Air Station, Jacksonville, Florida (App. 645–646); (4) a 5-acre parcel at the mouth of the Potomac River, in Virginia (App. 670); (5) a similar parcel in Chesapeake Bay, in Maryland (App. 674); (6) submerged lands in the Hudson River at West Point, New York (App. 699); (7) tide and submerged lands in Lake Ontario, New York (App. 699–700); (8) a lighthouse site in the Seaconnet River, Rhode Island (App. 705); and submerged lands in Lake Michigan at Waukegan, Illinois (App. 728–731). With the exception of that relating to the lighthouse in Seaconnet River, which, because of its proximity to the mouth of the river, is classified as "doubtful", all of these opinions involved lands under inland waters.

Section 355, Revised Statutes, seems to have been rendered by the Attorney General."

An examination of the various matters cited in this connection as rulings or declarations of the War and Navy Departments reveals that they do not support the State's allegation in regard to recognition of title to lands under the open sea. The first item set forth refers to 17 maps filed by the War Department with the Surveyor General of California. It is indicated (App. 504) that these maps were filed pursuant to the California Act of March 9, 1897 (Stats. 1897, p. 74) which granted to the United States submerged lands out to 300 yards fronting on uplands held for military purposes. But, as previously pointed out (*supra*, note 30, pp. 170–171), these maps were not filed pursuant to the Act of March 9, 1897, notwithstanding the misleading notations on some of the maps; they were filed under a wholly different statute, the Act of March 2, 1897 (Stats. 1897, p. 51), which was an Act ceding exclusive *jurisdiction* over all lands held for military purposes and not an act granting title.

"The only action which appears to have been taken was a letter from an Assistant United States Attorney in Los Angeles, dated December 13, 1934, giving qualified approval to the deeds executed by the City of Newport Beach on the basis of information received by telephone from the office of the District Engineer that the "title to these lands was originally in the United States Government, which conveyed it to the State of California" (War Dept. File: 7245 (Newport Beach, Calif.) 56/8).

722583—47——14

With only two possible exceptions, none of the other actions of the War and Navy Departments related to lands which may be classified as being located clearly in the marginal sea.[45] And the allegations as to these two will be considered briefly in order that there may be no misunderstanding as to their purport. One of these is the report of the Commandant of the Eleventh Naval

[45] The other nine matters listed by the State in this connection involved the following areas: (1) The 300-yard strip around Deadman's Island, located in Los Angeles Harbor (App. 505); (2) Tide and submerged lands adjacent to North Island, San Diego (App. 505–506); (3) Submerged lands adjacent to the Silver Strand opposite the Coronado Beach Military Reservation (App. 506); (4) Upland and adjacent tidelands above low water mark on the South Spit at the entrance to Humboldt Bay (App. 507); (5) Lands to be reclaimed in front of Terminal Island, in Los Angeles and Long Beach Harbors (App. 507–508); (6) Waterfront property in Los Angeles and Long Beach Harbors (App. 508); (7) Waterfront property in San Francisco Bay (App. 509–510); (8) Proposed sites for naval bases in San Francisco Bay (App. 511–526); and (9) the Army Port of Embarkation, Los Angeles Harbor (App. 526–527).

Elsewhere in the State's Appendix there appear other references to reports of this type made by the War and Navy Departments. These include reports by both departments relative to various lands situated in Los Angeles and Long Beach Harbors (App. 105, 187–203, 230–231, 258–260, 263–284, 284–294, 298); reports of the Board of Engineers for Rivers and Harbors relative to the Port of Seattle, Washington (App. 574–575) and the Port of Milwaukee, Wisconsin (App. 739); and reports of the Commission on Navy Yards and Naval Stations regarding lands situated in the bays of Galveston, Texas (App. 574–575) and Mobile, Alabama (App. 621–625).

District to the Navy Department, dated September 24, 1930 (App. 505–506) in regard to the acquisition of certain tidelands adjacent to North Island, San Diego. This same matter was also relied upon by the State as one of the alleged acceptances of grants (App. 117–131). The transfers of title growing out of this report did not in fact include any lands under the marginal sea. Notwithstanding the language "lying between the said line of the peninsula of San Diego and the pierhead line in the said Pacific Ocean as the same may hereafter be established by the federal government", no lands seaward of low water mark on the ocean side of the island were acquired (see map, App. 122). According to the records of the War Department, the pierhead line was not then and never has been extended into the Pacific Ocean at this location.

The other matter requiring discussion is the letter of the District Engineer, War Department, to the State of California, dated May 27, 1941, proposing an exchange of certain submerged lands of the United States in San Diego Bay for an equal area of the ocean side of Silver Strand opposite the Coronado Beach Military Reservation (App. 506). This item, too, was relied upon by the State in connection with the alleged acceptances of grants (App. 134–141). It is perhaps sufficient to point out that in the letter referred to, the District Engineer advised the State that

the plan was subject to approval by higher authority, that he was later obliged to report that higher authority had determined not to approve the plan (App. 140–141), and that the proposed exchange was therefore not consummated.

The State discusses and quotes at length from approximately 28 decisions of the Department of the Interior (App. 460–503) denying applications for oil and gas leases or permits involving tide and submerged lands adjacent to the coast of California.[44] It is alleged that these decisions were made "over a period of many decades" (App. 460). However, with the exception of one letter written in 1926, all of the decisions referred to were rendered during the period from 1933 to 1937. Since that period, no action has been taken by the Department on applications of this type.

An important fact to be noted in respect to these decisions is that in each instance the application

[44] Reference is also made to one ruling in 1882 on a placer mining application (App. 460) and, elsewhere in the Appendix, there are discussed 13 other rulings under various public land laws, involving lands in the Territory of Alaska (App. 531–540) and in the States of Washington (App. 565–574), Louisiana (App. 608) and Florida (App. 633–638). The lands involved in all of these decisions were, with one exception, situated either between high and low water marks or under inland waters. The one exception was the ruling (App. 637) in regard to a swamp land application made by the State of Florida covering certain lands near Key West, a portion of which may be situated in the open sea. However, it appears that this ruling was based in part on the fact that the lands were not shown to have been in existence at the time the Swamp Land Act was adopted.

being considered was filed under the provisions of the Mineral Leasing Act (41 Stat. 437; 30 U. S. C. sec. 181 ff.), which applies to "public lands." However, since the term "public lands" has been held not to extend to land situated below high water mark (*Barney* v. *Keokuk*, 94 U. S. 324, 338; *Mann* v. *Tacoma Land Company*, 153 U. S. 273, 284, discussed *supra*, pp. 62, 70), there was room for the conclusion that the Department of Interior had no *jurisdiction* over the lands covered by the several applications under the provisions of the Act. Accordingly, upon finding the lands to be of this type, the Department was not called upon to make any determination as to the ownership of the lands. Indeed this ground has been suggested in some of the rulings as a reason for denying the application. (See, e. g., App. 470, 471.)

It may be admitted, however, that some of the decisions cited by the State contain language declaring that the lands involved are the property of the State of California. But these declarations were confined largely to the relatively short period from 1933 to 1937, and in many of them the ruling was supportable on grounds other than State ownership of the lands involved. Indeed, in ruling upon the application of Joseph Cunningham (App. 463–467), the Secretary plainly stated that "If any question of title to such lands as between the State of California and the United States is to be tried, it is for the Federal courts" (App.

467). This does not in any way sustain the State's allegation that the Department has "over a period of many decades" held that such lands are owned by the State. Furthermore, the Department has consistently maintained a different position for the period since 1937.

The then Secretary of the Interior has made the following public statement regarding the position taken by the Department in rejecting the several applications for oil and gas permits during the period from 1933 to 1937 (Statement of Honorable Harold L. Ickes, Hearings before the Committee on the Judiciary, U. S. Senate, 79th Congress, Second Session, on S. J. Res. 48 and H. J. Res. 225, p. 4):

> The applications were rejected on the grounds that the Department of the Interior had no jurisdiction, that the several States owned this land beneath the waters, that California asserted jurisdiction and that, as the Department had said in the *Cunningham* case, if—
> "any question of title to such lands as between the State of California and the United States is to be tried, it is for the Federal courts." (55 I. D. 1, 3; 1934.)[45]

In this same statement, the Secretary referred to the Department's determination, in the year 1937,

[45] The decision of the Department of Interior in the *Cunningham* case is quoted extensively on pages 463–467 of the Appendix to the Answer.

to suspend action on all applications pending an adjudication of the question by the courts. The Secretary conceded (*id.* at p. 5) that this constituted "a change from the earlier action of myself and of the Department." In other words, it may be admitted that the decisions rendered during the period from 1933 to 1937, while in general constituting no square ruling in respect to the ownership of the lands involved, did reflect a belief of that Department that the title to the lands was in the State. However, the statements and declarations made by the Secretary and the Department prior to the change of position in 1937 provide no basis for an estoppel or any similar doctrine. Such a change of position can and should be taken by an administrative officer or department whenever it is determined that an existing interpretation is inaccurate, and this does not create an estoppel against the Government. Compare *United States* v. *San Francisco,* 310 U. S. 16, 31–32, in which the interpretation given by the Department of the Interior to Section 6 of the Raker Act of December 19, 1913 (38 Stat. 242, 245) over a period of 24 years was held not to constitute an estoppel against the Government in a suit to enjoin certain actions which the Department, under a new and contrary interpretation of the Section, had determined to be unlawful.

As shown by the foregoing discussion, it seems plain that there has not been any pattern of ex-

tensive and long-continued acquiescence by the United States in the alleged claims of the State. The large number of acceptances of grants of title and other interests in lands by the United States related primarily to tidelands and lands under bays, harbors, or other inland waters. The relatively few isolated instances of grants with respect to lands under the open sea can hardly represent any general policy of acquiescence by the United States. Nor has there been any such recognition by Congress or the executive branch as is suggested by the State. Congressional action has been at most ambiguous, and the actions taken by the executive departments do not support the sweeping claims of the State. We submit that there has been no such long-continued and consistent recognition or acquiescence by the United States with respect to ownership of the bed of the marginal sea as is suggested in the State's Answer.

B. THERE HAS BEEN NO RELIANCE BY THE STATE TO ITS INJURY OR DETRIMENT

In apparent recognition of the requirement that reliance is an essential element of an estoppel or like defense, the State has come forth with allegations of reliance in its Third Affirmative Defense (Ans. 15–16). It is there asserted that the State of California, acting in reliance upon the recognition by the United States of the State's ownership

of all land under navigable waters within the boundaries of the State, has made numerous grants, leases, easements, franchises and licenses involving such lands, that its political subdivisions have taxed such granted or leased interests, that the State, its various departments, grantees and lessees have gone into possession of such lands, exercising rights and attributes of ownership, and that the State and its municipalities and grantees have expended huge sums of money in the reclamation of large portions of such lands.

At the outset, it is important to note that in the case of real property, it is essential that "the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, 337.[46] Here, California was as well informed with respect to the title to the bed of the marginal sea as was the United States. And, an examination of the allegations, as explained in the Appendix to the Answer (pp. 740–817), discloses that there has been no reliance by the State to its injury or

[46] See also *Oklahoma* v. *Texas*, 268 U. S. 252, 257–258.

detriment as that requirement is generally understood."[47]

The Appendix refers to various Acts of the California Legislature, among them being the enactments asserting State ownership of tide and submerged lands within its boundaries (App. 741), granting certain portions of such lands to municipalities and counties (App. 742–754), authorizing the leasing of such lands for the extraction of oil and gas (App. 756–758), regulating the construction of groins, jetties, seawalls and bulkheads on such lands (App. 808–810), and consenting to the use by the United States of certain waters within the State for target practice opera-

[47] It has been stated in a variety of contexts that "estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities" (*Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 323); that the defense "operates only in favor of a person who has been misled to his injury" (*Ketchum* v. *Duncan*, 96 U. S. 659, 666); and that the defense is inapplicable unless one party "induced the other party by some means to change his position and act to his prejudice in consequence of the inducement" (*Jones* v. *United States*, 96 U. S. 24, 29). There is no reason to believe that these principles are inapplicable here. For a general discussion of the matter, see *United States* v. *Standard Oil Company of California*, 20 F. Supp. 427, 452–454 (S. D. Cal.), affirmed, 107 F. 2d 402 (C. C. A. 9), certiorari denied, 309 U. S. 673.

Furthermore, any contention as to reliance upon the acts or statements of officers or agents of the United States is governed by the rule that those dealing with such an officer or agent "must be held to have had notice of the limitation of his authority." *Wilber Nat. Bank* v. *United States*, 294 U. S. 120, 123–124.

tions (App. 817). The State also refers to such matters as the expenditures made by certain of its municipalities in the reclamation of tide and submerged lands for port, harbor and recreational purposes (App. 754–756), the more than 100 oil and gas leases and "easement agreements"[44] executed by the State, covering such lands (App. 758–787), the construction by these lessees of piers, wharves or islands in connection with drilling operations (App. 788–789), numerous wharf franchises granted by various counties for the construction and maintenance of wharves extending into navigable waters (App. 799–808), and the taxation by certain coastal counties of the mineral interests in submerged lands leased for the production of oil and gas (App. 810–816).

Apart from the fact that many of the lands thus referred to are not located in the marginal sea, it is difficult to perceive how the actions mentioned by the State satisfy the requirement as to reliance or change of position.[45] The State alleges, of course, that its actions were in reliance upon the Government's recognition of its title. However, it fails to show any injury or detriment

[44] These "easement agreements" are negotiated for the purpose of compensating the State of California for drainage from wells which are situated on private lands but are draining oil and gas from lands owned by the State (App. 775).

[45] For one thing, many of the transactions allegedly relied upon by the State as inducing reliance occurred several years subsequent to the action taken by the State in leasing lands below low water mark for the production of oil and gas.

resulting from the actions referred to. For example, the leasing of submerged lands for oil and gas development, with the accompanying collection of royalties, can be classed only as beneficial. So also are the revenues received by the political subdivisions of the State. And the expenditures by lessees of the State in the development of premises leased for the production of oil and gas were certainly not injurious to the State, whatever may have been the fortune of the lessees themselves.[80]

The only actions mentioned by the State which appear to involve any expenditure of public funds, and thus ostensibly to embrace a possible reliance or detriment, are the improvements made by certain municipalities in the reclamation of submerged lands for port and harbor purposes. But here, too, the requisite factors are missing. The State refers specifically to certain expenditures by the City of Long Beach in the construction of a breakwater, known as Rainbow Pier (App. 755), and to the joint expenditure by the City of Long Beach, the County of Los Angeles and the State, for the purpose of dredging the

[80] To the extent that the lessees may have an equitable claim, it might be appropriate, as pointed out elsewhere herein, pp. 144–145, 165, for Congress to recognize such claim in some manner. But the existence of any such possible equities with respect to relatively small portions of the coast should not preclude the Court from giving effect to the rights of the United States along the coast as a whole. Cf. *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 32.

channel and improving the jetties at the mouth of Alamitos Bay (App. 755–756). Aside from the fact that almost all such improvements are located within a bay or harbor, and are thus situated upon lands not involved in this suit, the expenditure of funds for this purpose by the State was not necessarily dependent upon its ownership of the lands involved. The State was possessed of the governmental power to erect improvements in navigable waters in aid of navigation, a power which the State may exercise so long as its action is not in conflict with a similar exercise by the United States of its paramount power to regulate and control navigation.[21] *County of Mobile* v. *Kimball,* 102 U. S. 691, 699; *Escanaba Co.* v. *Chicago,* 107 U. S. 678, 683. There was thus no occasion for any reliance upon any representation as to the title to the lands involved. It is also not apparent that there was any detriment to the State, since the public, which is represented by the State, benefited from the expenditures.

It is clear from the foregoing that the material set forth by the State fails to establish the required reliance or change of position to its injury or detriment.

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[21] In the instances cited by the State, permission for the erection of the structures in navigable waters was, of course, obtained from the War Department (App. 755, 756).

C. EVEN IF THE REQUISITE ELEMENTS WERE OTHERWISE PRESENT, THE PRINCIPLE OF ESTOPPEL WOULD NOT APPLY IN THIS PROCEEDING

We have undertaken to show above that there has been no recognition, acquiescence or uniform treatment by the United States in respect to the alleged title of the State to the lands here involved and no reliance upon any such action by the State to its detriment. Consequently, the State has presented no basis for an application of the doctrine of estoppel or some cognate defense. Cf. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393, 424–428. However, it is the further position of the Government that, even if the matters alleged by the State were supported, the United States would not thereby be precluded from asserting its rights in this proceeding.

1. Estoppel does not ordinarily apply as against the United States

The United States may not ordinarily be estopped. "At least it is true that no such result would be reached if a strict construction of the Government's act would avoid it." *Sanitary District* v. *United States*, 266 U. S. 405, 427, and cases cited. Particularly is this true when the matter involved is one of "national and international concern." *Ibid.* In the *Sanitary District* case this rule was discussed with respect to a political subdivision of a State which sought to raise the de-

fense with allegations of extensive operations in reliance upon both legislative and executive action by the Federal Government. The subject matter of the present suit is comparable. The United States is here asserting its rights in the lands underlying the three-mile belt adjacent to its shores, and the United States holds its interest in such lands, "as it holds all other property, for public purposes and not for private purposes." *United States* v. *Insley,* 130 U. S. 263, 265. Cf. *Causey* v. *United States,* 240 U. S. 399, 402. Since the control and disposition of its property is a sovereign function vested in the national government by Art. IV, sec. 3, cl. 2, of the Constitution (*Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, 158–159; *Light* v. *United States,* 220 U. S. 523, 536–537; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330, 335–336), the present proceeding clearly involves a matter of "national" concern, and, because of the relation of the three-mile belt to external affairs, also one of "international" significance. As a matter of general principle, therefore, the doctrine of estoppel or like defense should not and does not apply as against the United States in the present proceeding. As this Court remarked in *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, where it applied the rule that neither estoppel nor laches can prevent the United States from

enforcing a public right or protecting a public interest (p. 409):

> And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it.

2. No estoppel can arise from the mistaken or unauthorized acts, statements or commitments of officers of the United States

A second reason why estoppel does not apply in the present suit is the fact that the United States cannot be estopped from asserting its rights in a legal proceeding because of any mistaken or unauthorized action by its officers or agencies. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409; *United States* v. *San Francisco,* 310 U. S. 16, 31–32. Where the officer is "without authority to dispose of the rights of the United States", he "could not estop it from asserting rights which he could not surrender". *Utah* v. *United States,* 284 U. S. 534, 545–546.

Thus, it has been ruled that no estoppel arises, even in favor of an innocent purchaser, from the mistake of land officers in treating an erroneously meandered tract as subject to riparian rights under State laws and not subject to disposal under the laws of the United States (*Lee Wilson & Co.* v. *United States,* 245 U. S. 25, 31); or from statements made in letters signed by the Commissioner of the General Land Office and the Director of the Geological Survey that there were no unsurveyed lands in a locality in which certain lands were patented pursuant to an erroneous plat (*Jeems Bayou Club* v. *United States,* 260 U. S. 561, 564);[82] or from the erroneous interpretation of a statute by a Department charged with its administration (*United States* v. *San Francisco, supra*). Likewise the defense of estoppel has been held to be unavailable as against the United States in cases where the action relied upon was without authority, as, for example, where an officer permitted the cutting of timber on Indian lands beyond the quantity and quality specified in the contract therefor (*Pine River Logging Co.* v.

[82] However, since the defendants in the *Jeems Bayou Club* case were deemed to be "innocent" trespassers, they were permitted to deduct from their liability for the value of the oil which they had extracted the cost of drilling and operating the wells (pp. 564–5). It should be noted in the present case that the Complaint seeks merely a declaration of rights and relief looking to the future; it does not ask for an accounting for petroleum which has already been extracted.

United States, 186 U. S. 279, 291); or entered into an agreement with a power company in respect to the use of certain forest reservation lands for works employed in producing electric power, when permission for such use had not been obtained (*Utah Power & Light Co.* v. *United States*, *supra*); or accepted leases for lands from the patentee thereof on behalf of certain Indians, when the Indians had an independent right to the lands by virtue of occupancy (*Cramer* v. *United States*, 261 U. S. 219, 234).

A significant ruling on this point is to be found in *United States* v. *Standard Oil Company of California*, 20 F. Supp. 427, 452–454 (S. D. Cal.), affirmed, 107 F. 2d 402, 416 (C. C. A. 9), certiorari denied, 309 U. S. 673, one of the most important cases dealing with the rights of the United States in mineral lands. The United States had brought suit to quiet title to certain lands which should have been excepted from the grant of school lands made to the State of California by the Act of March 3, 1853 (10 Stat. 244), because the lands were known to be mineral in character at the time the official survey of the pertinent section ("section 36") was approved. Among the defenses offered to defeat the Government's claim was that of estoppel, based on certain acts done, and representations made, by officers and agents of the United States, some of them being remarkably similar to the actions relied on by the State

in the present proceeding. The actions there relied upon included: (1) rulings by lands officers in regard to certain entries on the lands involved under agricultural laws; (2) a statement by the Register of the United States Land Office to the Surveyor General of California that there were no adverse claims of record against the lands; (3) the refusal of the Secretary of the Navy to accept the offer of the section as a naval reserve on the ground that it did not contain oil in commercial quantities; and (4) similar statements by others during Congressional Committee hearings on a leasing bill. The court nevertheless ruled, following familiar principles, that the United States could not be estopped by these acts and representations.

In the present suit the State contends that the several officers or agencies of the Government performing the acts said to constitute recognition of the State's title were "acting within the scope of their authority as prescribed by law" (Ans. 13). Of course, the actions referred to may have been authorized for certain purposes, but they were unauthorized insofar as they may possibly have purported to give validity to a claim of title adverse to that of the United States. The power to recognize such adverse claims, being correlated to the power to dispose of the property of the United States, is by the Constitution vested in the Congress (Art. IV, sec. 3, cl. 2) and any such

action in regard thereto by officers of the executive branch must be authorized by statute. *United States* v. *Fitzgerald,* 15 Pet. 407, 421; *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 294. Cf. *Whiteside* v. *United States,* 93 U. S. 247, 256–257. In the present case, the State points to no such statutory authorization.

In *Sioux Tribe* v. *United States,* 316 U. S. 317, it was held that an Executive Order of the President adding certain public lands to an Indian reservation, although not authorized by statute, was valid and effective for the purpose for which it was issued, but that it did not vest in the Indians occupying the said reservation any title or interest in the lands in question for which the Government was required to pay compensation when the lands were subsequently restored to the public domain. In other words, it did not create a title adverse to that of the United States. So, in the present case, the officers and agents of the United States, referred to by the State, were undoubtedly authorized to perform such functions as constructing military and naval establishments, dredging channels, erecting breakwaters, and making similar harbor improvements. But such authority did not constitute authority to recognize a claim of title adverse to that of the United States. Consequently, the actions relied upon by the State could not create an estoppel against the United States.

3. Recognition or acquiescence on behalf of the United States, even if authorized, does not necessarily constitute a basis for estoppel or like defense

The actions of the various officers and agents of the United States cited by the State as constituting instances of recognition or acquiescence in the title of the several States to lands of the type involved, were, as heretofore indicated, actions which for certain purposes may have been valid and effective, but, in so far as they may have extended to a recognition of an adverse claim of title, were unauthorized. However, even if such recognition and acquiescence as that suggested by the State had existed, and had been authorized or participated in by the Congress, the United States would not thereby be estopped to assert its rights in this proceeding. On more than one occasion, the United States, through its executive and legislative branches, has acquiesced in, or even encouraged, certain uses of its lands or property by others, and such action has been held not to preclude the United States from subsequently asserting its full right and title to such lands. Certain examples of such action furnish persuasive analogies.

(a) *Mining claims on federally owned lands.*—Prior to 1866, virtually all mining operations in the western States were conducted by private individuals, without statutory authority, on lands owned by the United States. The so-called Gold

Rush was one of the most colorful and significant movements in the opening up of the western part of this country. Notwithstanding the fact that the lands and all minerals therein were the property of the United States, the practice of taking gold and other minerals was acquiesced in by the Congress and the Executive branch of the Federal Government, and such acquiescence was recognized by the courts. See *Sparrow* v. *Strong,* 3 Wall. 97, 104; *Buford* v. *Houtz,* 133 U. S. 320, 331–332. But this acquiescence and recognition did not prevent the United States from subsequently asserting its title to all the minerals and mining lands on the public domain by the enactment of laws prescribing the procedure and rules under which private rights (30 U. S. C. 21, *et seq.*), including both possessory rights by location (30 U. S. C. 22, 26) and the fee title by patent (30 U. S. C. 29), might be initiated. It seems clear that the earlier acquiescence in the private occupation of its lands for mining purposes has not been considered to have impaired the title of the United States to such lands. See *Forbes* v. *Gracey,* 94 U. S. 762, 763; *Del Monte Mining Co.* v. *Last Chance Mining Co.,* 171 U. S. 55, 62, 66. With respect to some mineral lands, in fact, Congress has revoked even its permission to acquire possessory rights, and now prescribes the leasing of such lands, with the payment of rentals and royalties to the United States. Mineral Leasing Act of Feb-

ruary 20, 1920 (41 Stat. 437, as amended, 30 U. S. C. 181).

(b) *Grazing on the public domain and the forest reserves.*—The livestock industry of the United States was largely developed by the extensive use of Federal lands, both on the public domain and in the forest reserves, for grazing purposes. This was acquiesced in, and, in fact, encouraged by, the United States, despite long-continued efforts to obtain legislation to regulate such use by a system of leasing and licensing. *Buford* v. *Houtz,* 133 U. S. 320, 326; *Camfield* v. *United States,* 167 U. S. 518, 527; *Omaechevarria* v. *State of Idaho,* 246 U. S. 343, 344, and fn. 1, 346. But such acquiescence did not prevent the United States from asserting its rights to the lands in question and revoking its implied license to use them for pasturage purposes. In the case of forest lands, such revocation occurred in 1906 under the forest reserve acts, as implemented by the regulations of the Secretary of Agriculture. See *United States* v. *Grimaud,* 220 U. S. 506, 521; *Light* v. *United States,* 220 U. S. 523, 536. In the case of the public domain generally, such revocation occurred as late as 1934 when the Taylor Grazing Act was passed. Act of June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976, 43 U. S. C. 315). See *Brooks* v. *Dewar,* 313 U. S. 354.

(c) *Unlawful enclosures.*—Closely related to the problem of grazing on the public domain was that of unlawful enclosures erected on such areas. Prior to 1885, large tracts were occupied and enclosed without lawful authority by persons engaged in the sheep and cattle industry. Although any occupation was recognized by the courts as preventing preemption settlement (*Atherton* v. *Fowler,* 96 U. S. 513, 518–519; *Hosmer* v. *Wallace,* 97 U. S. 575, 580), these occupations and enclosures, at the sufferance of the Government, did not create such rights in the lands of the public domain as to prevent the United States from declaring such activity unlawful and prohibited. Act of February 25, 1885 (23 Stat. 321, 43 U. S. C. 1061). *Camfield* v. *United States,* 167 U. S. 518, 527.

D. THIS SUIT IS NOT BARRED BY EITHER LACHES OR ADVERSE POSSESSION

In its Sixth Affirmative Defense (Ans. 19) the State alleges that, by reason of the matters set forth in earlier allegations, the United States has acquiesced in and recognized the title of the State of California to all tide and submerged lands within its borders for a period of 95 years, and is thereby precluded from asserting any title to the lands here involved. This allegation may be intended only as an additional statement, in different words, of the defense of estoppel, which has already been discussed. On the other hand, the

State may intend by this affirmative defense to contend that the present proceeding, because of the long period of time referred to, is barred by laches on the part of the United States. If this be true, the State's contention is not supported by controlling authority.

As indicated above (pp. 186–187), ownership of the lands underlying the three-mile belt became a question of major concern only in recent years, when the State undertook to grant leases in these lands, and when, except perhaps for sporadic instances prior thereto, the Department of Interior began to receive numerous applications in 1933 for permission to extract oil and other minerals from these lands. Within a relatively short period thereafter there was initiated the investigation which led to the institution of this proceeding. In a sense it may be said, therefore, that adjudication of the issue has been sought with comparative promptness. It is submitted, however, that any question as to delay or lapse of time in this respect is immaterial, since in any event the defense of laches is not available as against the United States. *United States* v. *Summerlin*, 310 U. S. 414, 416; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 132–133; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *United States* v. *Insley*, 130 U. S. 263, 266; *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735. And this Court has held this to be the rule in an origi-

nal suit brought by the United States against a State. *United States* v. *Michigan,* 190 U. S. 379, 405.

In addition to the defense of laches, the State may also intend to urge that the present suit is precluded because of prescription and adverse possession of the lands here involved. Such defense is suggested by the foregoing allegation as to lapse of time and the statement in the Third Affirmative Defense (Ans. 16) to the effect that the State "is now in open, adverse and notorious possession of" large portions of submerged lands underlying the coastal waters of the State. However, this contention also must fail, as prescription and adverse possession do not run against the United States, and possession of its lands, though "open, exclusive and uninterrupted" over a long period of time, creates no impediment to a recovery of such lands by the United States. *Oaksmith's Lessee* v. *Johnston,* 92 U. S. 343, 347. See also *Jourdan* v. *Barrett,* 4 How. 168, 184; *Burgess* v. *Gray,* 16 How. 48, 64; *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *Morrow* v. *Whitney,* 95 U. S. 551, 557; *Sparks* v. *Pierce,* 115 U. S. 408, 413; *Hays* v. *United States,* 175 U. S. 248, 260; *Northern Pac. Ry. Co.* v. *McComas,* 250 U. S. 387, 391. Similarly, statutes of limitation, except as expressly prescribed by the Congress, have no application to proceedings instituted by the United States. *United States* v. *Nashville, &c. Ry. Co.,* 118

U. S. 120, 125; *United States* v. *Knight*, 14 Pet. 301, 315; *United States* v. *Thompson*, 98 U. S. 486, 489; *Stanley* v. *Schwalby*, 147 U. S. 508, 514–515; *Davis* v. *Corona Coal Co.*, 265 U. S. 219, 222–223; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 132–133; *United States* v. *Summerlin*, 310 U. S. 414, 416.

The State's position in this regard is not supported by such cases as *Rhode Island* v. *Massachusetts*, 4 How. 591, *Indiana* v. *Kentucky*, 136 U. S. 479, or *Arkansas* v. *Tennessee*, 310 U. S. 563, where the principle of prescription was held to be applicable. Those cases all involved disputes as to the location of the boundary lines between the respective States and are readily distinguishable from the present controversy. As was stated by the Court in *Arkansas* v. *Tennessee, supra*, at p. 571, the question in that suit was "not one of title to particular land but of boundaries and of political jurisdiction as between Arkansas and Tennessee." In the present case, the issue is not one of boundary as between the United States and the State of California; there is no doubt that the area involved is within the boundaries of both California and the United States. The issue here is one of rights to property within that area. Furthermore, as Mr. Justice Holmes said in *Sanitary District* v. *United States*, 266 U. S. 405, 425, "this is not a controversy between equals." The boundary disputes referred to above were between

States exercising equal sovereign powers; in the present proceeding the United States is seeking to protect its interests in lands under the three-mile belt in behalf of all of the people of this country as against the local claims of the State. Cf. *Sanitary District* v. *United States, supra,* at p. 426.

E. THE ISSUE HERE INVOLVED IS NOT RES JUDICATA

In its Fifth Affirmative Defense (Ans. 17–18) the State advances the contention that by virtue of the decision of this Court in *United States* v. *Mission Rock Co.,* 189 U. S. 391, the issue presented in the present proceeding is *res judicata.* An examination of that decision reveals that this contention is totally without foundation.

The *Mission Rock* case was an action of ejectment brought by the United States against the occupants of certain lands *situated in San Francisco Bay* adjacent to two small rock islands, which had been reserved by Executive Order for naval purposes. The lands in controversy had originally been submerged lands, subsequently filled in and improved by the defendant, which held under a grant from the State of California. The decision of this Court was in favor of the defendant on the ground that the lands, being situated in navigable waters, had passed to the State upon its admission to the Union and could

not be made the subject of reservation by Executive Order.

The significant fact about the *Mission Rock* case is that it involved lands in San Francisco Bay, which is a part of the *inland waters* of the State. There is nothing in the case or the opinion of this Court which in any way refers to or affects the title to lands under the open sea. Obviously, the decision in that case did not dispose of the issue presented in this proceeding.

CONCLUSION

The motion for judgment should be granted.
Respectfully submitted.

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APPENDIX A

Articles V, VIII and XII of the Treaty of Guadalupe Hidalgo, 9 Stat. 922, 926–928, 929–930, 932:

ARTICLE V. The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled "*Map of the United Mexican States, as organized and defined by various acts of the Congress of said republic, and constructed according to the best authorities. Revised edition. Published at New York, in 1847, by J. Distur-*

nell." Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing-master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the schooners *Sutil* and *Mexicana*, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in it whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree regarding what may be necessary to these persons, and

also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the general government of each, in conformity with its own constitution.

ARTICLE VIII. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire

said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE XII. In consideration of the extension acquired by the boundaries of the United States, as defined in the fifth article of the present treaty, the government of the United States engages to pay to that of the Mexican republic the sum of fifteen millions of dollars.

Immediately after this treaty shall have been duly ratified by the government of the Mexican republic, the sum of three millions of dollars shall be paid to the said government by that of the United States, at the city of Mexico, in the gold or silver coin of Mexico. The remaining twelve millions of dollars shall be paid at the same place, and in the same coin, in annual instalments of three millions of dollars each, together with interest on the same at the rate of six per centum per annum. This interest shall begin to run upon the whole sum of twelve millions from the day of the ratification of the present treaty by the Mexican government, and the first of the instalments shall be paid at the expiration of one year from the same day. Together with each annual instalment, as it falls due, the whole interest accruing on such instalment from the beginning shall also be paid.

Act of September 9, 1850, 9 Stat. 452:

Chap. L.—*An Act for the Admission of the State of California into the Union.*

Whereas the people of California have presented a constitution and asked admission into the Union, which constitution was submitted to Congress by the President of the United States, by message dated Feb-

ruary thirteenth, eighteen hundred and fifty, and which, on due examination, is found to be republican in its form of government:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

SEC. 2. *And be it further enacted,* That, until the representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of California shall be entitled to two representatives in Congress.

SEC. 3. *And be it further enacted,* That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and in no case shall non-resident proprietors, who are citizens of the United States, be taxed higher than residents; and that all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor: *Provided,* That nothing herein

contained shall be construed as recognizing or rejecting the propositions tendered by the people of California as articles of compact in the ordinance adopted by the convention which formed the constitution of that State.

Article XII of California Constitution of 1849 (Stats. 1850, pp. 24, 34):

BOUNDARY

The Boundary of the State of California shall be as follows:

Commencing at the point of intersection of 42d degree of north latitude with the 120th degree of longitude west from Greenwich, and running south on the line of said 120th degree of west longitude until it intersects the 39th degree of north latitude; thence running in a straight line in a southeasterly direction to the River Colorado, at a point where it intersects the 35th degree of north latitude; thence down the middle of the channel of said river, to the boundary line between the United States and Mexico, as established by the treaty of May 30th, 1848; thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the 42d degree of north latitude; thence on the line of said 42d degree of north latitude to the place of beginning. Also all the islands, harbors, and bays, along and adjacent to the Pacific coast.

SCHEDULE

SEC. 1. All rights, prosecutions, claims, and contracts, as well of individuals as of

bodies corporate, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, until altered or repealed by the Legislature, shall continue as if the same had not been adopted.

Article XXI of California Constitution of 1879 (Treadwell's edition, 1931, p. 120):

BOUNDARY

SECTION 1. The boundary of the state of California shall be as follows: Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred and twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred and twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a straight line, in a southeasterly direction, to the River Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river to the boundary line between the United States and Mexico, as established by the treaty of May thirtieth, one thousand eight hundred and forty-eight; thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also, including all the islands, harbors, and bays along and ajacent to the coast.

APPENDIX B

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Military Reservation, San Diego Harbor (pp. 93-94).	State of California	1897	Military Reservation	300-yard strip around Point Loma peninsula, entrance to San Diego Bay. Part of the area involved is along the open coast; the remainder is within the bay.			x
Zuniga Shoal, San Diego Harbor (p. 96).	do	1897	do	300-yard strip adjacent to North Island, entrance to San Diego Bay.			x
Military Reservation, Presidio at San Francisco (pp. 96-98).	do	1897	do	300-yard strip adjacent to Presidio, situated on south side of Golden Gate, San Francisco Bay. It is not along the open coast.	x		
Lime Point, Military Reservation, San Francisco (pp. 99-100).	do	1897	do	300-yard strip adjacent to Lime Point, situated on north side of Golden Gate, San Francisco Bay. Most of the area is within the Golden Gate and the bay; however, a small portion seems to be located along the open sea.			x

[1] The State has made extensive allegations as to grants of interests in submerged lands to the United States, in an effort to establish acquiescence by the United States in the alleged rights of the State. The primary purpose of this summary analysis is to show that the great majority of the grants relied upon by the State involved tidelands or inland waters rather than the marginal sea. Some of the transactions are not readily classifiable in this regard, either because the location of the tract is not clear or because, even when the precise location is known, it is not clear whether the area falls in the marginal sea. An effort is made in the column entitled "Remarks" to indicate the reason for the classification of each particular tract. The page references, unless otherwise indicated, relate to the appendix to the State's answer.

There have been omitted from this summary analysis of grants references made by the State to any general situations where no specific areas have been identified and where no grants were shown to have been made. However, there have been included references to certain proposed grants of specific areas which were not consummated; in this latter situation, the areas have been described in the "Remarks" column, but have not been included in the "Classification" columns which are used to compile a statistical summary of grants of interests in submerged lands.

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Deadman's Island, Military Reservation, San Pedro (pp. 101–106).	State of California	1906	Military Reservation	300-yard strip around island in Los Angeles outer harbor, within San Pedro Bay. It is not clear whether San Pedro Bay is to be regarded as a true bay, or as open sea. However, the area has been held to be inland waters in *United States* v. *Carrillo*, 13 F. Supp. 121 (S. D. Cal.).		x	
Fort MacArthur Military Reservation, San Pedro (pp. 105–108).	do	1897	do	300-yard strip in Los Angeles outer harbor, within San Pedro Bay. See foregoing comment as to San Pedro Bay.		x	
Angel Island Military Reservation (p. 109).	do	1897	do	300-yard strip around island in San Francisco Bay.	x		
Fort Mason Military Reservation (p. 109).	do	1897	do	300-yard strip in San Francisco Bay	x		
Benicia Military Reservation (pp. 109–110).	do	1897	do	300-yard strip in Suisun Bay (an arm of San Francisco Bay).	x		
Alcatraz Island Military Reservation (pp. 110–111).	do	1897	do	300-yard strip around island in San Francisco Bay.	x		
San Diego Military Reservation (p. 111).	do	1897	do	300-yard strip in San Diego Bay	x		
Red Rock or Molate Island, military reservation (p. 112).	do	1897	do	300-yard strip around island in San Francisco Bay.	x		

See footnote *supra*, p. 237.

Coronado Beach, military reservation (pp. 113-114).	do	1927	do	300-yard strip in San Diego Bay	X		
Brothers and Sisters, military reservation (p. 114).	do	1927	do	300-yard strip around islands in San Francisco Bay.	X		
Monterey, military reservation (p. 115).	do		do	300-yard strip in Monterey Bay	X		
Marin Islands, military reservation (p. 115).	do	1927	do	300-yard strip around islands in San Francisco Bay.	X		
Yerba Buena Island, military reservation (pp. 116-117).	do	1927	do	do	X		
Area adjacent to North Island, San Diego (pp. 117-131).	do	1934	Naval station	The grant purported to cover tide and submerged lands in three separate areas: (1) in San Diego Bay; (2) in Spanish Bight, an arm of San Diego Bay; and (3) in the Pacific Ocean (adjacent to North Island (referred to in the grant as the "Peninsula of San Diego") lying between highwater mark and "the pierhead line in the said Pacific Ocean as the same hereafter be established by the federal government" (p. 131)). No pierhead line has ever been established at this point in the Pacific Ocean; consequently, no lands under the open sea were in fact granted. See *supra*, p. 188. Thus, the only areas actually granted were not along the open coast.	X		
Coronado Beach, Military Reservation (pp. 134-141).	do	1941	Military Reservation	This was not a completed transaction. An officer in the War Department Engineer's Office, Los Angeles, proposed an exchange of certain United States owned submerged lands in San Diego Bay, adjacent to the Silver Strand,			

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Coronado Beach Etc.—Con.	State of California	1941	Military Reservation	Coronado Beach, for a similar area on the ocean side of the Strand. However, the plan was subject to approval by higher authority in the War Department, and this approval was not given.			
Breakwater at entrance to Humboldt Bay (pp. 141-144).	....do....	1889	Improvement of navigation.	Congress appropriated funds for construction of breakwater on condition that title be obtained, free of expense, to the South Spit at entrance to bay, from which breakwater extends into ocean. All of the area described in the grant was situated landward of low-water mark, and thus involved only tidelands. See *supra*, note 28, p. 168.	x	.....	.....
Point Hueneme Lighthouse (pp. 145-146).	....do....	1941	Lighthouse.....	Area involved consisted of accreted tidelands in front of a Coast Guard reservation, the seaward boundary being high-water mark.	x	.....	.....
Unloading docks, Catalina Island (pp. 146-154).	....do....	1941	Transportation of material for construction of breakwater at Los Angeles.	This transaction involved an easement granted by the State to a private construction company having a contract with the War Department. The easement permitted the erection of docks	.....	.....	x

See footnote *supra*, p. 227.

				into the open sea from Catalina Island. No grant to the United States was involved. The only action taken by the United States consisted of instructions by U. S. Engineers to the construction company and a notice from the War Department to the State of the company's application for permission to construct the docks.			
Salt water pipe line, El Segundo, Calif. (pp. 154-156).	do	1943	Synthetic rubber plant.	This was an easement granted by the State to the Standard Oil Co. to lay a pipe line approximately 220 feet into the Pacific Ocean. The pipe line was used in connection with a synthetic rubber plant which the Standard Oil Co. operated under a contract with the Defense Plant Corporation. The easement was not assignable and, contrary to the State's allegations (p. 156), no interest passed to the United States or the Defense Plant Corporation. The area involved was Santa Monica Bay, and, in view of the configuration of the coast at that point, it is not clear whether this area should be regarded as a true bay, notwithstanding that it has been held to be such for other purposes. See *People v. Stralla*, 14 Cal. 2d 617 (1939).		x	
Custom house, San Francisco (pp. 157-160).	do	1854	Custom house	"Beach and water property" located in San Francisco Bay.	x		
Mare Island shores (pp. 160-163).	do	1854	Naval base	Tide and submerged lands adjacent to Mare Island, in upper San Francisco Bay.	x		
Quarantine station, San Diego (p. 163).	do	1906	Quarantine station	Tide and submerged lands in San Diego Bay.	x		

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Naval hospital, San Diego (pp. 163-164).	State of California and city of San Diego.	1921	Naval hospital	Tide and submerged lands in San Diego Bay.	x		
Benicia, Military Reservation (p. 164).	State of California	1935	Military reservation and arsenal.	Tide and submerged lands in Suisun Bay, an arm of San Francisco Bay.	x		
Jetties, entrance to Newport Bay (pp. 171-183).	City of Newport Beach, Calif.	1934	Improvement of navigation.	This transaction involved 5 deeds and a disposal permit. Only 2 of the deeds related to lands in the marginal sea. The remaining instruments related to tidelands or inland waters. See *supra*, pp. 177-178.			x
Victory Pier, Long Beach (pp. 203-206).	City of Long Beach, Calif.	1943	Storage and marine facility.	Formerly tide and submerged lands in Long Beach Harbor, within San Pedro Bay, leased by United States.		x	
Berth 11, Long Beach (3 tracts) (pp. 207-211).	do	1937-1939	Naval landing	Formerly tide and submerged lands in Long Beach Harbor, within San Pedro Bay. Occupied by United States under revocable permit.		x	
Pontoon bridge, Long Beach (pp. 212-213).	do	1944	Naval	Retractable pontoon bridge over entrance channel to Long Beach inner harbor, connecting mainland with eastern end of Terminal Island. It is not entirely clear whether this area should be regarded as within the inner harbor, which would be clearly "inland waters," or		x	

[1] See footnote *supra*, p. 227.

				within the outer harbor, which is here classified as "doubtful" in view of the uncertain status of San Pedro Bay.			
Army and Navy Y. M. C. A. Building (pp. 214-216).	....do....	1942	War.....	Building situated on lands, formerly tide and submerged, adjacent to Pier A, Long Beach Harbor, within San Pedro Bay. United States holds under partial assignment of lease to Y. M. C. A.	.....	X	.....
Reclaimed lands in front of Terminal Island (pp. 234-245).	City of Long Beach, Calif. (later city of Los Angeles).	1906	Dredging of inner harbor.	Lands involved are in Los Angeles Harbor. Railroad company, as lessee of certain reclaimed lands adjacent to Terminal Island under lease from city, granted to United States the right to lay pipes across its lands for purpose of conveying dredgings from inner harbor to outer harbor. The entire area is within San Pedro Bay.	.....	X	.....
Municipal pier No. 1, Los Angeles (pp. 250-255).	City of Los Angeles, Calif.	1916-17 1934	Naval torpedo base, submarine base, training station, and landing.	Lease of portions of municipal pier in Los Angeles Harbor, within San Pedro Bay.	.....	X	.....
Outer harbor, wharf and dock, company pier, Los Angeles (pp. 255-259).	....do....	.....	Military and naval.....	This pier is located in Los Angeles Harbor, within San Pedro Bay. The Wharf Co., as lessee of city, dredged channel and constructed pier, which is alleged to have been leased and used by United States at various times, particularly during World War I and World War II.	.....	X	.....
9.75-acre exchange—lands in front of Fort MacArthur for lands adjacent to Deadman's Island (pp. 261-269).	....do....	1913 1915	Military reservation, improvement of navigation.	Widening of entrance channel to Los Angeles Harbor was contemplated by United States as a rivers and harbor project. This required removal of Deadman's Island, a military reservation around which United States acquired a	.....	X	.....

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
9.75-acre exchange—Con.	City of Los Angeles, Calif.	1913 1915		300-yard strip under act of California legislature of Mar. 9, 1907. The exchange involved an equal area of land adjacent to Fort MacArthur. Both tracts were situated in Los Angeles Harbor, within San Pedro Bay.			
61.96-acre exchange—Reservation point for lands adjacent to Deadman's Island (pp. 280-283).	do	1926	Quarantine station, Coast Guard, etc.—Improvement of navigation.	This also was result of widening of entrance channel to Los Angeles Harbor and consequent removal of Deadman's Island. United States received in return a rectangular area, known as Reservation Point, at western end of Terminal Island, in Los Angeles Harbor, within San Pedro Bay.		x	
Submarine base site, Los Angeles (pp. 284-296).	do	1917	Submarine base	The city of Los Angeles offered certain submerged lands in Los Angeles Harbor, within San Pedro Bay, to the Navy for a submarine base. However, the transfer was not consummated.			
"Area D"—Los Angeles (pp. 294-297).	do	1937 1938	Improvement of navigation.	Disposal permits executed by city for deposit of materials dredged by United States in deepening of main channel and turning basin. Area involved was adjacent to Fort MacArthur in Los Angeles Harbor, within San Pedro Bay.		x	

See footnote *supra*, p. 227.

Reeves Field, Los Angeles (pp. 207-208).	do	1928 1933 1935	Naval aviation	A portion of the airport was used by the Navy during 1928-29 under a permit from the city. Leased by the Coast Guard for the year 1933. Beginning in 1935 it was occupied by the Navy under a permit-lease, renewable annually. Area involved is situated on Terminal Island in Los Angeles Harbor, within San Pedro Bay, and consists partly of reclaimed land.		x	
Naval landing, Los Angeles (pp. 303-305).	do	1932	Landing of naval vessels.	A pier located south of Fort MacArthur near beginning of breakwater, Los Angeles Harbor, within San Pedro Bay. Occupied under a revocable lease permit.		x	
Consolidated Steel Corp. shipyard, Los Angeles (pp. 307-309).	do	1941	Shipbuilding	Land occupied under a 5-year permit by private shipbuilding company having a "Facilities Contract" with U. S. Maritime Commission. Area located on west basin, an arm of the inner harbor of Los Angeles.	x		
California Shipbuilding Corp. shipyard, Los Angeles (pp. 309-310).	do	1941	do	Land occupied under a 5-year permit by private shipbuilding having a "Facilities Contract" with U. S. Maritime Commission. Area located on east basin in inner harbor of Los Angeles.	x		
Navy shipbuilding plant, Los Angeles (pp. 310-311).	do	1942	do	Land occupied by Navy under 5-year permit. Area located on west basin in inner harbor of Los Angeles.	x		
Los Angeles Port of Embarkation (W-808) (pp. 311-312).	do	1942	Storage and embarkation.	Land occupied by U. S. War Department under lease renewable annually. Area located on west basin in inner harbor of Los Angeles.	x		

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Los Angeles Port of Embarkation (W-3460) (pp. 312-313).	City of Los Angeles, Calif.—Continued	1942	Storage and embarkation—Continued	Land occupied by U. S. War Department under lease. Area located in triangular tract formed by junction of Southern Pacific and Pacific Electric Rys. and is adjacent to west basin in the inner harbor of Los Angeles.	x		
Parcel "5C P.15," Los Angeles (pp. 312-314).	....do	1943	War	Land occupied by U. S. War Department under lease. Area located near Slip No. 5, inner harbor of Los Angeles.	x		
Parcel covered by Engineer lease 2349, Los Angeles (p. 314).	....do	1943	....do	Land occupied by U. S. War Department under lease. Area located on Slip No. 5, inner harbor of Los Angeles.	x		
California Yacht Club, Los Angeles (pp. 314-316).	....do	1942	Coast Guard base	Leasehold interest acquired by condemnation proceedings. Property situated on east basin, inner harbor of Los Angeles.	x		
Southern Pacific railroad tract, Los Angeles (pp. 316-318).	....do	1942	Naval	Leasehold interest sought in condemnation proceedings, which were dismissed when city executed lease, agreeing to make settlement with any private parties involved. Land situated on west side of entrance channel, near turning basin, inner harbor of Los Angeles.	x		

[1] See footnote *supra*, p. 227.

Parcels adjacent to California Shipbuilding Corp., Los Angeles (pp. 318-319).	City of Los Angeles, Calif.	1942	Shipbuilding	Condemnation proceedings instituted at request of U. S. Maritime Commission. Land situated on inner side of Terminal Island, inner harbor of Los Angeles.	X		
Naval Armory, Santa Barbara (pp. 326-330).	City of Santa Barbara, Calif.	1942	Naval Reserve Armory.	This parcel consisted of 0.918 acres granted by city as an armory site. The lands involved were formed by gradual accretions to the seashore west of Santa Barbara breakwater. Since they resulted from a gradual movement seaward of the "tideland" strip the lands should probably be classified as tidelands, which are not involved in this proceeding. However, they are here classified as "doubtful" to cover possibility that some of the area may be filled land.		X	
Section base, Santa Barbara (pp. 331-333).	do	1942	Naval section base	Grant of temporary use (for duration of war) of a 0.80-acre parcel. Lands involved were of the same type as those granted for the Naval reserve armory, supra.		X	
Section base, Santa Barbara (pp. 333-334).	do	1942	do	Same, the land in question being a 0.75-acre parcel.		X	
Section base, Santa Barbara (pp. 335-336).	do	1942	do	Same, the land in question being a 0.80-acre parcel.		X	
Naval base, San Diego (pp. 341-344).	City of San Diego, Calif.	1916	Naval base	Grant of tide and submerged lands known as "Dutch Flats," situated on north shore of San Diego Bay.	X		
Naval supply base and landing, San Diego (p. 345).	do	1919	do	Lands consisted of reclaimed tide and submerged lands in San Diego Bay.	X		
Naval hospital, San Diego (pp. 345-346).	do	1919	Naval hospital	do	X		

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Naval training station, San Diego (p. 346).	City of San Diego, Calif.	1919	Naval station	Lands consisted of reclaimed tide and submerged lands in San Diego Bay.	x		
Naval destroyer base and Drydock, San Diego (pp. 346-348).	do	1919	Naval base, repair station, shipyard, drydock.	Grant of lands situated between high-water mark and bulkhead line in San Diego Bay. An adjacent parcel of similar land was added to the base by a grant dated July 17, 1940.	x		
Pier and boat landing, San Diego (p. 346).	do	1923	Naval landing	Grant of 2 parcels of land situated between bulkhead line and pierhead line in San Diego Bay.	x		
Navy pier, San Diego (p. 346).	do	1940	do	Additional parcel situated between bulkhead line and pierhead line in San Diego Bay, adjacent to that granted in 1923.	x		
Naval hospital, San Diego (pp. 348-349).	do	1925	Naval hospital	Additional parcel of tide and submerged lands in San Diego Bay adjacent to Naval hospital site granted in 1919. See above.	x		
Navy pier, San Diego (p. 349).	do	1925	Navy pier	Parcel of tide and submerged lands in San Diego Bay adjacent to those granted for drydock purposes in 1919. See above.	x		

See footnote *supra*, p. 227.

Marine Corps base, San Diego (pp. 349-350).	do	1937	Marine base	Grant of a parcel of tide and submerged lands in San Diego Bay in exchange for conveyance by United States of a tract of land adjacent to municipal airport.	x		
Naval destroyer base, San Diego (pp. 350-351).	do	1941	Naval base	Lease of additional tract of land between high watermark and bulkhead line in San Diego Bay, adjacent to United States destroyer base.	x		
Air and seaplane hangers, San Diego (p. 351).	do	1935	Naval air station	Grant of tide and submerged lands in San Diego Bay, situated on the east side of North Island.	x		
San Diego Municipal Airport (p. 351).	do	1941	Aviation	Lease of 3 parcels constituting a part of the municipal airport, known as Lindbergh Field, which is located on the north side of San Diego Bay.	x		
4.893-acre parcel, San Diego (p. 351).	do	1941		Lease of lands described as "tidelands"	x		
1.37- and 1.24-acre parcels, San Diego (pp. 351-352).	do	1938	Naval	Grant of 2 parcels of tide and submerged lands in San Diego Bay in exchange for grant by United States of a portion of former military reservation known as San Diego barracks.	x		
Federal housing parcel, San Diego (p. 352).	do	1941	Housing	Lease of parcel of tide and submerged lands in San Diego Bay.	x		
Parcel adjoining municipal airport, San Diego (p. 352).	do	1945		Grant of 11.29-acre parcel. Municipal airport, known as Lindbergh Field, is on north side of San Diego Bay.	x		
243-acre parcel, San Diego (pp. 352-353).	do	1933		Grant of lands situated between bulkhead line and pierhead line in San Diego Bay.	x		
Four parcels, San Diego (p. 353).	do	1938 1940 1943		Grants of tide and submerged lands "lying in the Bay of San Diego" (p. 353).	x		

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Naval air station, Coronado (p. 358).	City of Coronado, Calif.	1944	Naval aviation	Condemnation proceedings to acquire certain tide and submerged lands in Spanish Bight, which is an arm of San Diego Bay, situated between North Island and Coronado.	x		
Federal Housing project, Coronado (pp. 358-359).	do.	1943	Housing	Condemnation proceedings to acquire a triangular parcel of tide and submerged lands at the eastern tip of Coronado lying between high watermark and the bulkhead line in San Diego Bay.	x		
Navy amphibious training base, Coronado (pp. 359-360).	do.	1943	Naval base	Lease (for duration of war) of 134-acre parcel of tide and submerged lands in San Diego Bay.	x		
Navy pier and landings, National City (p. 362).	City of National City, Calif.	1940	Navy landing	Grant of parcel of lands between high watermark and pierhead line in San Diego Bay. National City is situated on mainland south of city of San Diego and faces San Diego Bay.	x		
5.8-acre parcel, National City (p. 362).	do.	1943	Naval base	Condemnation proceedings to acquire parcel of tide and submerged lands in San Diego Bay as addition to naval base.	x		
Naval supply depot, Oakland (pp. 365-374).	City of Oakland, Calif.	1940	Naval depot	Grant of 392 acres of tide and submerged lands situated on Oakland water front in San Francisco Bay.	x		

[1] See footnote *supra*, p. 227.

Same (pp. 374-376)	do	1940	do	Grant of sewer and drainage easement for naval supply depot, San Francisco Bay.	x	
Same (pp. 376-378)	do	1942	do	Grant of vehicular overpass easement over a street and railroad tracks for entrance to naval supply depot, San Francisco Bay.	x	
Various water-front parcels, Oakland (pp. 379-381).	do	1942-1945	Naval facilities	Eight leases covering piers, wharves, dry-docks, terminals, and other water-front property on San Francisco Bay.	x	
Various water-front parcels, Oakland (pp. 381-384).	do	1941-1944	Army terminals	11 leases covering portions of wharves, terminals, and other water-front property on San Francisco Bay.	x	
Warehouse, Oakland (p. 384).	do	1944	Storage	Lease by Maritime Commission of warehouse at foot of Webster St., on San Francisco Bay.	x	
Medical supply warehouse, Oakland (pp. 384-389).	do	1943	Navy storage Warehouse	Condemnation of parcel of reclaimed tide and submerged lands adjacent to naval supply depot on San Francisco Bay.	x	
Naval supply depot, Oakland (pp. 389-392).	do	1943	Naval depot	Condemnation of certain lands, including reclaimed tide and submerged lands, for an addition to naval supply depot, situated on San Francisco Bay.	x	
72-acre parcel, Oakland (pp. 392-395).	do	1941	Military facilities	Condemnation by War Department of certain reclaimed waterfront property on San Francisco Bay.	x	
13.6202-acre parcel, Oakland (pp. 395-398).	do	1941	do	Condemnation by War Department for a term of 5 years of a portion of "Outer Harbor and North Industrial Area," situated below line of high tide in San Francisco Bay.	x	
Certain lands, Oakland (pp. 398-402).	State of California and City of Oakland.	1943	Federal housing	Condemnation, for period of 1 year (renewable), of use of certain parcels of filled tide and submerged lands in city of Oakland, on San Francisco Bay.	x	

722563—47——18

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Waterfront property, San Francisco (pp. 405–407).	Board of State Harbor Commissioners for San Francisco Harbor.	1940–1943	Naval facilities	15 revocable lease permits issued to Navy Department covering various piers, wharves, berths, buildings, and roadways in and adjacent to San Francisco Bay.	X		
Waterfront property, San Francisco (pp. 407–409)	do	1940–1942	Military facilities	8 revocable lease permits issued to War Department covering various piers, sheds, and wharves in and adjacent to San Francisco Bay.	X		
Waterfront property, San Francisco (pp. 409–410).	do	1942	Agriculture Department offices.	5 revocable lease permits covering certain rooms in Ferry Bldg. and State Agriculture Bldg. adjacent to San Francisco Bay.	X		
Waterfront property, San Francisco (pp. 410–411).	do	1941–1944	Coast Guard facilities.	6 revocable lease permits covering berthing and dock space adjacent to certain piers and wharves in San Francisco Bay.	X		
Waterfront property, San Francisco (pp. 411–414).	do	1937–1945	Various Government facilities.	Revocable lease permits to various U. S. Government departments and offices, including War, Navy, Post Office, Treasury, Agriculture, and Immigration and Naturalization Service, for space and rooms in certain buildings and wharves adjacent to San Francisco Bay.	X		

[1] See footnote supra, p. 227.

Piers 7, 17, 27, 30, and 41, San Francisco (pp. 414-416).	....do....	1942	Army Transport facilities.	Condemnation by War Department for term of years of use of certain piers situated on tide and submerged lands, partially filled and partially unfilled, in San Francisco Bay. Order of immediate possession entered Nov. 2, 1942. Condemnation suit dismissed after execution of lease on Feb. 14, 1944.	X		
Certain lands at Hunters Point, San Francisco (pp. 418-420).	Various grantees of State of California Board of Tidelands Commissioners.	1942	Naval repair base.....	2 condemnation suits to acquire certain uplands and adjacent tide and submerged lands at Hunters Point, on southwestern side of San Francisco Bay.	X		
Certain lands at Molate Point, California (pp. 422-426).	....do....	1942	Navy fuel storage facilities.	Condemnation of certain uplands and adjacent tide and submerged lands at Molate Point, on eastern side of San Francisco Bay.	X		
Certain lands at Point Richmond, Calif. (pp. 426-430).	....do....	1942	Shipbuilding.....	Condemnation of 120 acres, [illegible] partly of upland and partly of tide and submerged lands at and adjacent to Point Richmond, on eastern shore of San Francisco Bay.	X		
Certain lands in city of Richmond, Calif. (pp. 430-431).	....do....	1943	....do....	Condemnation of 17.06 acres of tide and submerged lands adjacent to the above-described 120-acre tract at Point Richmond, on east shore of San Francisco Bay.	X		
Naval air station, Alameda (pp. 434-437).	City of Alameda, Calif.	1939	Naval aviation.....	Grant of partially filled tide and submerged lands (1,100 acres) situated on eastern shore of San Francisco Bay.	X		
Same (pp. 437-440).....	....do....	1937	....do....	Same (920.3 acres).....	X		

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Fort Canby Military Reservation (pp. 544-551).	State of Washington....	1909	Military reservation....	Act of State legislature granted to United States for public purposes the use of tide and submerged lands out to depth of 4 fathoms around any military or other reservations. Fort Canby Military Reservation is situated at Cape Disappointment, which is the northern headland at mouth of Columbia River and faces both the Pacific Ocean and the Columbia River. Thus, the lands involved in this grant appear to be situated in the Pacific Ocean as well as in the Columbia River. However, the opinions of the Attorney General of Mar. 20, 1926 (34 Op. A. G. 426) and Aug. 28, 1926 (34 Op. A. G. 531), referred to in the appendix to the answer (pp. 545-551), relate to the question of rights in the area known as Peacock Spit which is described as located 1 mile southeast of Cape Disappointment and which appears to be in the Columbia River rather than along the open sea.	----------	----------	x

[1] See footnote supra, p. 237.

Navy yard, Bremerton, Wash. (pp. 551-552).	....do	1919	Navy yard	Grant of right to use certain tide and submerged lands in front of city of Bremerton, on Puget Sound.	x		
Parcel situated between Keyport and Brownsville, Wash. (p. 552).	....do	1913	Naval facilities	Grant of tide and submerged lands situated on west shore of Puget Sound.	x		
Naval supply base, Seattle (pp. 559-561).	....do	1942	Naval base	Condemnation of certain piers and other waterfront property in Port of Seattle (sometimes referred to as Smith Cove condemnation).	x		
Todd-Seattle drydock, Seattle (pp. 561-564).	....do	1942	Shipbuilding	Condemnation of certain piers, docks, and filled lands situated on West Waterway at south end of Seattle Harbor.	x		
Fort Stevens, Point Adams, and Sand Island, Oreg. (pp. 564-566).	....do	1864	Military reservation	Grant of lands situated "between high and low tide" in front of Fort Stevens and Point Adams, on south shore of Columbia River, and to Sand Island, in Columbia River, "subject to overflow between high and low tide." No lands in the marginal sea appear to be involved.	x		
Houston Ship Canal, Tex. (pp. 566-569).	State of Texas	1943	FWA project—Houston water supply system.	Condemnation of easement for a water pipe line under Houston Ship Canal, which extends from Galveston Bay to city of Houston, a distance of approximately 25 miles inland.	x		
Certain parcel in Oso Bay, Tex. (p. 569).	....do	1942	FWA project—Corpus Christi sewer system.	Condemnation of easement under Oso Bay, which is a shallow arm of Corpus Christi Bay.	x		
Buffalo Bayou, Tex. (p. 569)	....do	1944	Shipbuilding	Condemnation of old bed of Buffalo Bayou at Houston, Tex., more than 25 miles inland.	x		

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
978.63 acres in Galveston Bay (p. 500).	City of Galveston, Tex.	1907	Improvement of navigation.	Grant by city of its interest in certain tide and submerged lands in Galveston Bay, executed in return for expenditures by United States in certain harbor improvements.	x	.....	.....
South jetty, Aransas Pass, Tex. (pp. 500-502).	State of Texas do	1907	Improvement of navigation.	Grant for tidelands around Mustang Island for construction of a jetty at Aransas Pass, which is entrance to Corpus Christi Bay. Grant, by its discription, extended only to "low water shore line" and followed the "meanders of the low water line." Although the area is adjacent to the open waters of the Gulf of Mexico, the grant apparently did not extend seaward of the low-water mark.	x	.....	.....
Immigration station, Galveston (p. 502).	City of Galveston, Tex.	1907	Immigration and naturalization service.	Grant of tide and submerged land situated in Galveston Bay.	x	.....	.....
South jetty, Galveston (pp. 502-503).	State of Texas	1912	Military reservation and harbor improvement.	South jetty extends eastward into Gulf of Mexico from Fort San Jacinto, situated on northeastern tip of Galveston Island. The jetty was completed by the United States in 1907, 15 years prior to this grant which was issued to quiet certain claims	.....	.....	x

See footnote supra, p. 227.

				to lands within the fort. However, the grant covered not only the fort but the jetty, and "all accretions and all tidelands" contiguous to the lands described, the purpose probably being to remove any doubt as to title of the United States to any lands formed by accretion adjacent to the jetty. See *supra*, pp. 172–174.			
Canal lot No. 114, Galveston (p. 595).	do	1930	Intracoastal waterway.	Grant of submerged lands in east Galveston Bay.	x		
9.96-acre parcel, Galveston (p. 595).	do	1880		Grant of submerged land in Galveston Harbor.	X		
10-acre parcel between Padre Island and Brazos Island, Tex. (p. 595).	do	1877	Lighthouse	Grant of submerged lands situated in Laguna Madre, near Brownsville, Tex.	X		
Aransas Bay target area, Tex. (p. 595).	do	1945	Navy bombing range.	Lease of circular area, 2,000 feet in diameter, consisting of submerged lands in Aransas Bay, near Corpus Christi, Tex.	X		
Army air base, Shreveport (pp. 607–608).	State of Louisiana	1930	Army aviation	Grant of lands which formerly were the beds of certain streams, lakes, bayous, and lagoons at Shreveport, La., approximately 190 miles from the open sea.	X		
Ship Island, Mississippi (pp. 612–613).	State of Mississippi	1858	Military reservation	Notwithstanding a possible contrary impression suggested by the State's allegations, this transaction actually involved no grant of any lands at all, upland or submerged. See note 28, *supra*, p. 169.			
Quarantine station, Mobile (pp. 620–621).	State of Alabama	1925	Quarantine station	Grant of tide and submerged lands in and around Sand Island in Mobile Bay.	X		
Inland Waterway, Florida (p. 628).	State of Florida	1929	Intracoastal waterway.	Grant of right-of-way through certain rivers, bays, sounds, lakes, and other inland waters from Jacksonville to Miami, Fla.	X		

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
North jetty, St. Johns River, Fla. (pp. 631–633).	State of Florida.....	1938	Improvement of navigation.	This is 1 of 2 parallel jetties extending into the Atlantic Ocean from the mouth of the St. Johns River. The jetty was completed by the United States in 1904. The 1938 deed executed by Florida was apparently designed merely to prevent squatters from making claim to lands formed by accretion on the north side of the jetty adjacent to the island from which the jetty extends into the ocean. See discussion, *supra*, pp. 175–177.	.....	.....	x
Spoil area, Crystal River, Fla. (p. 639).	.....do.....	1939	.....do.....	Entrance channel to Crystal River dredged by United States. The State issued a permit for the deposit of the dredged material in certain designated areas in the river and in the Gulf of Mexico. The area thus included inland waters, as well as the Gulf of Mexico. It is not clear why the United States needed any such disposal permit, regardless of the ownership of the underlying lands, since the project involved the improvement of navigation in navigable waters. See discussion, *supra*, p. 178.	.....	.....	x

See footnote *supra*, p. 227.

Naval air station, Jacksonville (pp. 645-646).	....do....	1939	Naval aviation.....	This is described as "a 300-acre tract of property situated at the mouth of the St. Johns River." Actually, it is a former military reservation located on the river 7 miles above the city of Jacksonville and almost 30 miles from the sea	x	.....	.....
Certain islands and banks, Savannah River (pp. 650-651).	State of Georgia.....	1820	Aids to navigation....	Quitclaim by State covering certain sites in the Savannah River upon which the United States had theretofore erected beacon lights.	x	.....	.....
Inland waterway, Georgia (pp. 651-652).	....do....	1914-1939	Intracoastal waterway.	Grants of certain marsh lands, anchorage areas, rights-of-way, etc., in rivers and other inland waters.	x	.....	.....
Georgetown jetties, Winyah Bay, S. C. (pp. 653-654).	State of South Carolina.	1889	Improvement of navigation.	Quitclaim of area outward 500 feet from two jetties to be constructed into ocean from entrance to Winyah Bay.	.....	.....	x
Fort Moultrie, S. C. (pp. 654-655).	....do....	1896	Military reservation....	Quitclaim of certain lands, including land under water out 100 yards, in and adjacent to Fort Moultrie, Sullivan's Island, which is northern headland at entrance to Charleston Harbor.	.....	.....	x
Fort Moultrie, S. C. (pp. 655-656).	....do....	1900	....do....	....do....	.....	.....	x
Fort Moultrie, S. C. (p. 656).	....do....	1903	....do....	....do....	.....	.....	x
Inland waterway, South Carolina (pp. 656-657).	....do....	1903	Intracoastal waterway.	Grant of strip of land 400 feet wide through Sullivan's Island narrows and other inland waters from Charleston to McClellandville, S. C.	x	.....	.....
Fort Moultrie, S. C. (p. 657).	....do....	1905-1916	Military reservation....	Four additional quitclaim grants to land adjacent to Fort Moultrie, on Sullivan's Island, at entrance to Charleston Harbor. 3 of these extended only to low-water mark. The fourth extended to 100 yards beyond low-water mark.	.....	.....	x

Summary analysis and classification of alleged grants of interest in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Certain tracts in and around Bull Bay, S. C. (pp. 657-658).	State of South Carolina.	1939	Migratory bird refuge.	Grants of tidelands in and around numerous islands in the vicinity of Bull Bay, Cape Romain, Bird Bank, and Big and Little Raccoon Keys, Charleston County, S. C. These grants extend only to lands uncovered at low tide.	x		
Parris Island, S. C. (p. 658)	do	1941	Marine base	Grant of lands between high and low water mark surrounding Parris Island.	x		
Fort Ripley shoal, Charleston Harbor, S. C. (p. 659).	State of South Carolina and city of Charleston.	1876	Lighthouse	Grant of 10-acre submerged tract in Charleston Harbor.	x		
"Old Fort Johnston," Southport, N. C. (p. 660).	State of North Carolina.	1901	Military reservation	Grant of tide and submerged lands extending to middle channel of Cape Fear River.	x		
Intracoastal waterway, North Carolina (p. 662).	do	1931	Intracoastal waterway.	Grant of right of way and title to filled lands situated therein from Cape Fear River, at Southport, to North Carolina-South Carolina line.	x		
Cransy Island, Va. (p. 668)	State of Virginia	1914	Improvement of navigation.	Grant of submerged area adjacent to island in Elizabeth River for purpose of constructing a bulkhead and reclaiming lands behind said bulkhead by deposit of materials dredged from Norfolk and Portsmouth Harbors.	x		

See footnote *supra*, p. 227.

Killick Shoal, Virginia (p. 670).	....do....	1885	Lighthouse.....	Grant of submerged lands situated in Chincoteague Bay.	x	.....	.....
Parcel at mouth of Potomac River (p. 670).	....do....	1876	.....	Grant of 5-acre parcel of submerged lands on southeasterly side of entrance of Potomac River into Chesapeake Bay.	x	.....	.....
Naval Academy, Annapolis, Md. (p. 671).	State of Maryland....	1872	Naval reservation.....	Grant of submerged lands, out to distance of 200 feet, adjacent to Naval Academy, situated on Severn River and Chesapeake Bay.	x	.....	.....
Point Lookout, Md. (p. 672).	....do....	1920	Naval facilities.....	Grant of rectangular area of submerged lands at mouth of Potomac River for use as a calibration range.	x	.....	.....
Sharkfin Shoal, Md. (p. 674)	....do....	1892	Lighthouse.....	Grant of submerged lands situated between Clay Island and Bloodsworth Island in Chesapeake Bay.	x	.....	.....
5-acre parcel in Chesapeake Bay (p. 674).	....do....	1883	Aid to navigation.....	Grant of submerged lands situated in Chesapeake Bay.	x	.....	.....
Petty's Island, N. J. (pp. 675-676).	State of New Jersey...	1890	Improvement of navigation.	Grant of lands below high watermark in front of Petty's Island in Delaware River near Camden to be excavated in connection with improvement of harbor of Philadelphia, Pa.	x	.....	.....
Dan Baker and Stony Point Shoals, N. J. (pp. 676-677).	....do....	1907	....do....	Grant of an upland area in Delaware River formed by deposit of dredged materials behind a bulkhead constructed around two shoals, the dredging being performed by the United States in connection with improvement of bed of the river.	x	.....	.....
Parcel between Government Mole and Cape Henlopen, Del. (pp. 681-682).	State of Delaware.....	1871	....do....	Grant of submerged lands situated in Delaware Bay inside of Cape Henlopen.	x	.....	.....

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Breakwater, Cape Henlopen, Del. (p. 682).	State of Delaware	1873	Improvement of navigation.	Further grant of submerged lands between Government Mole and Cape Henlopen in Delaware Bay.	x		
Reedy Island, Del. (p. 683)	do	1873	do	Grant of submerged lands at north end of Reedy Island, approximately 60 miles above Cape Henlopen, within Delaware Bay.	x		
Parcel between iron pier and Cape Henlopen, Del. (p. 684).	do	1889	do	Further grant of submerged lands in Delaware Bay inside of Cape Henlopen.	x		
Navy yard, Philadelphia (p. 685).	State of Pennsylvania	1863-[2] 1886	Navy yard	Grant of "League Islands" and submerged lands situated in basin or channel between said islands and mainland between Delaware and Schuylkill Rivers.	x		
Various tracts in New York Harbor (pp. 689-691).	State of New York	1880	Military reservations, immigration station, etc.	Grants of submerged lands around Governor's Island, Bedloe's Island, Ellis Island, David's Island, and Forts Lafayette, Hamilton, Wadsworth, and Schuyler, all in New York Harbor.	x		
Various lighthouse sites, New York (pp. 692-697).	do	1867 1874	Lighthouses	These transactions appear to involve merely cessions of jurisdiction, and not grants of property.			

[2] See footnote *supra*, p. 227.

Military Academy, West Point, N. Y. (pp. 700-701).	do	1892	Wharves, docks, etc.	Grant of submerged lands in Hudson River in front of U. S. Military Academy.	x		
Great Beds Shoal, New York (p. 701).	do	1880 1892	Lighthouse	Grant of submerged lands situated in Raritan Bay at intersection of Raritan River and Perth Amboy channels.	x		
Battery, New York City (p. 701).	do	1892	Custom house facilities.	Grant of submerged lands in New York Harbor, adjoining the battery extension.	x		
Parcel in Hudson River, New York City (p. 701).	do	1892	Defense and safety of city of New York.	Grant of submerged land situated in Hudson River adjacent to lower Manhattan Island.	x		
Parcel in Norwalk River, Connecticut (p. 702).	State of Connecticut	1925	Aid to navigation	Grant of submerged tract 200 feet in diameter for erection of a beacon light in Norwalk River.	x		
Parcel in Sheffield Island Harbor, Connecticut (p. 702).	do	1925	do	Grant of similar tract for same purpose in Sheffield Island Harbor, near mouth of Norwalk River.	x		
"Gull Rocks," Newport Harbor, R. I. (p. 703).	State of Rhode Island	1885	Lighthouse	Grant of submerged lands around certain rocks in Newport Harbor, East Passage, Narragansett Bay.	x		
"Whale Rock," Narragansett Bay, R. I. (p. 704).	do	1881	do	Grant of submerged lands around a rock in West Passage, Narragansett Bay.	x		
Parcel in Seaconnet River, R. I. (p. 705).	do	1883	do	Grant of submerged lands around a rock near mouth of Seaconnet (or Sakonnet) River. This area is probably inland, but in view of its proximity to the mouth of the River, it is classified here as "doubtful."		x	
Bullock's Point, R. I. (p. 705).	do	1875	do	Grant of submerged lands in Providence river.	x		
Fuller's Rocks: R. I. (p. 705).	do		do	do	x		

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Sassafras Point, R. I. (p. 706).	State of Rhode Island.	.....	Lighthouse.....	Grant of submerged lands in Providence river.	x	.....	.....
Great Salt Pond Harbor, R. I. (p. 706).	.....do.....	1919	.....do.....	Grant of 2 parcels of submerged lands at entrance to Great Salt Pond Harbor, on Block Island. It is not clear just where these lands are located. At least part of the area is probably located within the harbor, but it is not clear whether any of it is outside the entrance to the harbor.	.....	x	.....
Bishop's Rock, Rhode Island (p. 706).	State of Rhode Island.	1919	Naval station.....	Grant of submerged lands situated in Narragansett Bay.	x	.....	.....
Minot's Rock, Massachusetts (p. 708).	State of Massachusetts.	1847	Lighthouse.....	Grant of submerged lands around Minot's Rock or Ledge in Massachusetts Bay. However, it is not clear whether this bay is to be regarded as inland waters (as a "historic bay"), or whether it is to be treated as open sea.	.....	x	.....
Parcels at mouth of Merrimac River, Mass. (p. 708).	.....do.....	1790	Aids to navigation....	Grants of 4 sites for buoys in Merrimac River, the sites being known as "Hum Sands," "Sunken Rocks," "Gang Way Rock," and "Half Tide Rocks."	x	.....	.....

See footnote *supra*, p. 227.

Half tide rocks (p. 708)	do	1816	do	Although this is alleged to be a grant, it is probably merely a cession of jurisdiction over submerged lands in Merrimac River.	x		
"Nix's Mate," Boston (pp. 708-09).	do	1832	do	Grant of submerged lands in Boston Harbor for use as site for a beacon.	x		
Point Allerton Bar, Boston (p. 709).	do	1855	do	do	x		
Site for fort, New Bedford (p. 709).	do	1856	Military reservation	Grant of submerged lands on Egg Island Shoal in front of site selected for a fort in New Bedford Harbor, an arm of Buzzard's Bay.	x		
Clark's Point, New Bedford (p. 709).	do	1856	do	Grant of submerged lands in New Bedford Harbor in front of upland tract acquired by United States.	x		
Gallop's Island, Boston (p. 710).	do	1880	Improvement of navigation.	This was probably not a grant of title but merely a cession of jurisdiction and the right to fill in certain flats and submerged lands in connection with the construction of sea walls in Boston Harbor.	x		
Navy yard Boston (pp. 710-711).	do	1899	Extension of navy yard.	Grant of submerged lands in front of Boston Navy Yard lying between wharf line and pier and bulkhead line in Charles and Mystic Rivers.	x		
The "Graves," Boston (p. 711).	do	1903	Aid to navigation	Grant of rectangular parcel of submerged lands at entrance to Boston Harbor for use as light and fog signal station.	x		
Fort Revere, Hull, Mass. (p. 711).	do	1905	Military reservation	Although alleged to be a grant, this seems to be merely a cession of jurisdiction and the tract described extends only to low water mark.	x		

Summary analysis and classification of alleged grants of interest in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Deer Island, Boston (pp. 711–712).	State of Massachusetts.	1907	Military reservation...	Grant of authority to occupy certain flats and place structures in waters adjacent to Deer Island, in Boston Harbor, the upland of which had been acquired by the United States for fortification purposes.	x		
Parcel in Boston Harbor (p. 712).	....do....	1911	Immigration station...	Grant of tide and submerged lands in Boston Harbor.	x		
Naval drydock, Boston (pp. 713–714).	....do....	1920	Drydock.....	Grant of lands between high and low water mark, and right to dredge and construct wharves so as to connect tract with ship channel, the location being in South Boston, on Boston Harbor.	x		
Navy yard, Boston (p. 714)..	....do....	1938 1941	Additions to navy yard.	Grants of submerged lands for construction of additional piers, docks, and similar facilities at Boston Navy Yard, on Charles and Mystic Rivers.	x		
Army base, South Boston (p. 714).	....do....	1942	Military reservation..	These lands and flats were adjacent to or in Boston Harbor.	x		
Parcel in Boston Harbor (p. 714).	....do....	1943	Coast Guard base.....	Grant of certain submerged lands in Boston Harbor adjacent to upland acquired by United States.	x		

See footnote *supra*, p. 227.

Navy drydock, South Boston (p. 715).	....do....	1942	Drydock	Condemnation of submerged lands in Boston Harbor for expansion of navy drydock.	x		
Plum Island Sound, Mass. (p. 715).	....do....	1944	Wildlife refuge	Condemnation of two parcels constituting part of Parker River National Wildlife Refuge.	x		
Isle of Shoals, N. H. (p. 716).	State of New Hampshire.	1820	Lighthouse	Grant of White Island, one of the Isles of Shoals. The grant makes no mention of lands below low tide.	x		
Sunken Rocks, Portsmouth, N. H. (pp. 716–717).	....do....	1821	Improvement of navigation.	Grant of submerged lands in Portsmouth Harbor as site for a pier or beacon.	x		
Parcels in Lubec Narrows, Maine (pp. 719–720, 722).	State of Maine....	1887	Lighthouse	Grant of submerged lands situated "at Lubec Narrows, in Quoddy Roads."	x		
Crabtree Point Ledge, Maine)pp. 720, 722).	....do....	1887	....do....	Grant of submerged lands situated in Frenchman's Bay.	x		
Hog Island Ledge, Maine (pp. 720–721).	....do....	1857	Military reservation	Grant of submerged lands in front of a fortification in Portland Harbor.	x		
Parcel at mouth of Kennebec River (p. 721).	....do....	1857	....do....	Grant of submerged lands in front of fortifications at mouth of Kennebec River, which flows into Casco Bay.	x		
Clark's Ledge, Eastport Harbor, Maine (p. 723).	....do....	1889	Lighthouse	Grant of an island ledge described as "almost covered at high water" and "about two hundred feet long and seventy-five or one hundred feet wide" when "exposed at low water," its location being near entrance to St. Croix River, Eastport Harbor, Maine.	x		
Parcels in Lake Erie (p. 726).	State of Ohio....	1875	Aids to navigation	Grants of submerged lands situated in Lake Erie.	x		
Isle Royal National Park, Mich. (p. 734).	State of Michigan....	1942	National park	The Secretary of the Interior was authorized by Congress to accept donation of certain submerged lands in Lake Superior. However, the Act merely referred "to any such lands not now owned by the United States."	x		

Summary analysis and classification of alleged grants of interests in submerged lands from States to the United States, as set forth in the appendix to the State's answer [1]—Continued

Tract	Grantor	Year	Purpose	Remarks	Classification		
					Inland waters or tidelands	Doubtful	Open sea
Milwaukee Harbor turning basin. (pp. 738, 739).	State of Wisconsin	1929	Improvement of navigation.	Grant of certain submerged lands in Lake Michigan required in connection with the improvement of Milwaukee Harbor.	x		
			TOTAL		159	22	14
			GRAND TOTAL		195		

See footnote, *supra*, p. 227.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. ~~12~~ 6—ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF,

v.

STATE OF CALIFORNIA.

SUPPLEMENTAL BRIEF OF LAWRENCE WARDS ISLAND REALTY COMPANY *AS AMICUS CURIAE*

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January 1947.

INDEX

PAGE

Essentials in History, p. 243. Albert Bushnell Hart, Prof. of History, Harvard ---------- 3

Harvard Law Journal, Judicial Notice, January 1944, p. 270/294 ---------- 5

Hearings of Committees of Judiciary, United States Senate and House, 79th Congress, 2nd Sess. ---------- 4

McColloch *v.* Maryland, 4 Wheaton 316 ---------- 3

Original Settlements along the Delaware, p. 96, Benjamin Ferris ---------- 5

Original Settlements along the Delaware, p. 118, Benjamin Ferris ---------- 6

Original Settlements along the Delaware, p. 134, Benjamin Ferris ---------- 5

IN THE

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No. 12—ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF,

v.

STATE OF CALIFORNIA.

SUPPLEMENTAL BRIEF OF LAWRENCE WARDS ISLAND REALTY COMPANY as Amicus Curiae, on Motion for Judgment by the United States as prayed in the Complaint on the Grounds that the purported defenses set forth in the State's Answer are insufficient in law, the cause being set down by order of the Court "for argument on the pleadings". Sup. Ct. Journal, 1945 Term, p. 269.

The question presented is what lands underlying the three mile limit within the coast of the United States and the tidelands and lands under the waters of navigable rivers are included in national sovereignty ownership of the territory acquired by the Federal Union at the time of the creation of the National Union, and also in the territory since acquired by the United States, and whether the rights to these lands now belong to the United States, or whether some portion of these lands have passed to the State of California or to other States on an "equal footing" with the Original States.

Summary of Argument.

Each member State of the Continental Congress was a complete national sovereign in itself, and took over the national sovereign property in the exterior and interior tidelands in the English Colonies from the British Crown under the Treaty of Paris in 1783, and held it until the Independent States formed the Federal Union as a complete national sovereign, and by adopting the U. S. Constitution provision of Article IV, Section 4, placing the duty on the Federal Union to protect the State members thereof against invasion, automatically transferred to the new National Sovereign all the exterior and interior tidelands of each state member and each state member of the Federal Union thereby surrendered and transferred its national sovereignty to the new federal Union by U. S. Constitutional authority. The U. S. Constitution has placed the ownership of the exterior and interior tidelands and lands under the waters of navigable rivers in the Federal Union.

ARGUMENT.

Point A.

Tidelands facing the rivers and ocean belonged to the Crown of Great Britain as a national sovereign. Under the Treaty of Paris, 1783, this national sovereign property was relinquished to each of the Thirteen Original States, the 13 Independent National Sovereigns being entitled to receive the national sovereign tidelands within the respective boundaries of each separate Original State.

Point B.

On the adoption and ratification of the United States Constitution each Independent National Sovereign State of the Thirteen Original States transferred its National Sovereignty to the Federal Union and transferred with it

the national property that belonged to a national sovereign by virtue of its rights to the lands underlying said waters of the ocean and to the tidelands and lands under the waters of navigable rivers, which lands it had received from the English Crown under the Treaty of Paris. Each Original State surrendered its national sovereignty to the Union, and retained only its local State sovereignty. Being no longer a national sovereign the State could not retain title to these national tidelands, and thereafter must re-acquire said tidelands by consent of the National Union. The adoption of Article 4 of the United States Constitution, Section 4 of which provides:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion;* * *"

placed this national sovereign obligation and duty upon the Union, and took it from the States, reducing each of the Original States to a local State Sovereign incapable of owning the title to national sovereign tidelands. The United States Constitution has made the Union the sole owner of national sovereign tideland property necessary to carrying out its duty to protect each State from invasion. Necessary means proper and suitable and does not mean indispensible. This meaning of "necessary" was urged by Hamilton. Essentials in History by Albert Bushnell Hart, Prof. of History, Harvard, American Book Co., Cinn., 1905, p. 243, and its constitutional meaning was defined in *McCulloch* v. *Maryland*, 4 Wheaton, 316, in the discussion on "implied powers".

In its brief the United States here seeks to separate the lands under the marginal seas (the three mile coastal strip) from the inland riparian lands and the lands under navigable rivers. The principle of the ownership of each is the same, being based on the national ownership as belonging to the Crown at the time of the Revolution, for the reason that such ownership of tidelands and lands submerged under the waters adjacent to the coast was neces-

sary for the protection of the Kingdom. The Nation of Great Britain owned these lands throughout the English Colonies and at home, and transferred them by surrender and treaty to the Thirteen Original States as Thirteen Original Nations, and the latter in turn, each transferred its share of them to the Union. Whatever decision this Honorable Court makes as to the ownership of the lands under the marginal seas must necessarily affect the legal principle underlying the right of ownership of the title to the interior tidelands and the lands beneath inland navigable waters. The ownership of riparian lands goes with the national sovereignty as well as the ownership of the lands under the marginal seas goes with the national sovereignty.

Estoppel.

The States have issued patents to their purported tidelands since the adoption and ratification of the United States Constitution, and the patentees, and their successors in interest have relied upon these State grants, paid taxes on these lands, improved them by filling in, building wharves, bulkheads, docks, and erecting structures thereon, since 1789, without any question being made by the United States until about 1937, of the rights of the States or of their patentees or their successors in title to so develop and own these tidelands. Hearings of Committees of the Judiciary, United States Senate and House, 79th Cong. Second Sess., especially Report of American Assn. of Port Authorities, Senate Judiciary Committee, 79th Cong. 2nd Sess. p. 220, S. J. Res 48 H J Res 225, Feb. 5, 6 and 7, 1946.

The failure of the United States to question title and the reliance by innocent purchasers of tidelands originating in State grants of title clearly raises the question of estoppel, and exception should be made in handing down this Honorable Court's judgment to the general rule that estoppel may not avail against the United States. Innocent holders of title should be protected where their grants have been issued by the State, or any agency thereof, over six

years before the year 1937, at which time the question was first raised claiming title by the United States to the lands under the marginal seas or of lands beneath inland waters where the tide ebbs and flows and under the waters of navigable rivers above tidelands.

This motion for judgment on the pleadings is in effect generally to try the cause on judicial notice. It is within the powers of this Honorable Court to make its own inquiry, and the right of each justice thereof, as to what was common knowledge at the time of the Revolution. Inquiry is not confined to undisputed questions of law and fact that are presented in the pleadings. Harvard Law Journal, January 1944, p. 270/294—Judicial Notice.

Right of Title by Conquest Confirmed.

In acquiring territory in the English, Dutch and Swedish Colonial Settlements in America; the English acquired title by discovery followed by occupation to New England, Virginia, Maryland, Georgia and the Carolinas. The Dutch acquired the New Netherlands by right of discovery and occupation. The Swedes acquired the lands along the Delaware by right of conquest, and not by discovery, in 1637. During its period of occupation under the conquest, Queen Christiana of Sweden, made crown grants of land, dry as well as wet, to private parties. Original Settlements along the Delaware, Benjamin Ferris, p. 134—Deed to Captain Hans Ammundson Besk, for a tract of lands wet and dry lying in New Sweedland, Marcus Hook (translation by Charles Springer), dated August 20, 1653. (Original translation in possession of Historical Society of Pennsylvania.)

This grant was confirmed, among others, by the Treaty of surrender made by Gov. Rising to Gov. Peter Stuyvesant in 1655 when the Dutch conquered New Sweden. Original Settlements along the Delaware, Ferris, p. 96. The English in 1664 when they captured the Delaware holdings from the Dutch confirmed the private and national titles. Section 2 "Articles of Agreement" between Sir Robert Carr and the Dutch and Swedes inhabiting Delaware Bay, and

Delaware River, p. 118 Original Settlements along the Delaware, Ferris, p. 118; which reads:

> "2. That whoever or what nation soever doth submit to his majesty's authority, shall be protected in their estates, real and personal whatsoever, by his Majesty's laws and justice."

When the Dutch recaptured this territory from the English in 1673, the private titles were again confirmed, and when the territory was again taken back by the English in 1674, the private titles were again confirmed by the English.

The Treaty of Paris 1783 confirmed private titles, but transferred the lands under water belonging to the Crown of Great Britain to the National Sovereign Independent State of Delaware as one of the Thirteen Original States. The wet lands therein belonging to the State were transferred to the United States through the ratification of the Constitution of the United States by the Thirteen Independent States. Delaware was the only Original State whose lands had originally been acquired by conquest alone, but the grants of its mother country of Sweden were confirmed, thus the right of a Nation to acquire lands by conquest and deed them to individuals was constantly recognized. The Delaware titles were confirmed by each succeeding sovereign.

Conclusion

The motion for judgment should be granted except as modified to protect grantees of tidelands, lands under the marginal seas and under navigable rivers throughout the United States under patents issued by the States, and their successors in interest, where the State patents were issued over six years ago, six years being the usual period of limitation recognized in public land grants by the United States. The protection should relate back to the date of the original issue by the State or by its Commissioners of

Land Office, or other Agency, but the exception should not include or be extended to any tidelands or lands under navigable rivers purported to be acquired from any patentees of the State or from their successors in interest by adverse possession or by condemnation proceedings commenced by the State, or by any of its sub-divisions or municipal or private corporations or agencies, for adverse possession or condemnation of United States property may not avail against the United States.

Respectfully submitted,

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January 1947.

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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

October Term, 1946

No. ~~13~~ Original.

16

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

Petition for Allotment of Time for Oral Argument.

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IN THE

Supreme Court of the United States

October Term, 1946

No. 12 Original.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

Petition for Allotment of Time for Oral Argument.

The State of California respectfully petitions the Court for an allotment of four hours time for oral argument in the above entitled cause, basing its petition upon the following grounds:

1. This is an original proceeding in which the Federal Government is asserting title in fee simple to, or paramount rights in, approximately 3,000 square miles of territory wholly within the boundaries of California, including filled lands formerly below low-water mark which have been improved with structures of enormous value, and including large areas of submerged lands which have been granted by the State to its municipalities, and other areas which are the subject of leases, franchises and permits to hundreds of its citizens for a

variety of purposes. This case is represented by the Attorney General of the United States as being a "test" case which will "settle" the same issues for all other coastal States of the Union.

2. The Brief filed herein by plaintiff presents not only arguments upon the pleadings but is, in effect, a presentation to this Court of the entire case upon facts judicially known to the Court. The hearing now set before this Court on March 12, 1947, is, therefore, a trial of the cause on all issues, both of fact and law.

3. The issues of law and fact are numerous and complex and involve the basic relationships between States and Federal Government under the American Constitutional system. The defenses of the State of California cannot be presented adequately in the time usually allotted for oral argument in private litigation. Among the questions presented by plaintiff's Brief upon which defendant desires to present argument are the following:

(a) The question whether this Court has jurisdiction of the case as presented in plaintiff's complaint and brief; whether any justiciable issues are presented; and whether there is a case or controversy under Article III, Section 2 of the Constitution.

(b) Whether the Attorney General has authority to institute this action.

(c) The question as to what rights and powers in the lands below low-water mark and outside so-called "inland waters" were acquired by the original States in 1776, as successors of the Crown of England.

(d) The previous question brings in issue the legal rights of the Crown of England to lands below low-water mark and outside so-called "inland waters" under the common law of England prior to 1776.

(e) The question as to whether the so-called three-mile rule as developed in international law could in any way limit the rights of the Crown as against its subjects or the rights of the Crown's successors, the original States, as between themselves and the Federal Government.

(f) The question whether the vesting of powers of external sovereignty in the Federal Government by the constitutional grants, or from any other source, involved any cession to or acquisition by the Federal Government of lands below low-water mark and outside so-called "inland waters" within the territory of the original States.

(g) The extent of the territory and jurisdiction of the original States in 1789.

(h) The question whether the early acts of the Federal Government in recognizing the three-mile limit as against other nations constituted an annexation of territory to the United States.

(i) The question whether proprietary title to or interest in lands within the territory of a State could vest in the national sovereign by reason of its position in international affairs.

(j) The question whether ownership of lands beneath navigable waters within a State is a necessary incident of State sovereignty or is an incident of sovereignty at all.

(k) The question whether all lands beneath navigable waters passed to the new States upon their admission to the Union under the rule of equality of States or only lands beneath so-called "inland waters" and between high- and low-water mark.

(l) The question as to what constitutes the public lands or public domain of the United States and as to whether lands beneath navigable waters within a State constitute public lands of the United States.

(m) The question of the interpretation and meaning of the Act of Congress admitting California to the Union, particularly as to whether the Federal Government reserved to itself the lands beneath navigable waters.

(n) The question whether, if ownership of lands beneath navigable waters is not an incident of sovereignty at all, either Mexico or the United States ever acquired any title thereto; and whether, if such be the law, California is not the owner by reason of being the first appropriator and of having possessed and occupied such lands since the adoption of its Constitution in 1894.

(o) The question whether the doctrines of prescription, long usage and acquiescence do not apply as between sovereigns; and whether California (if it did not already have good title) has not acquired perfect title to all lands beneath navigable waters within its boundaries by reason of prescription and

also through the long acquiescence of plaintiff in the exercise by California of dominion and sovereignty over such lands.

For the reasons above stated, defendant State of California prays the Court to allow it four hours for the presentation of its defense.

Respectfully submitted,

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February, 1947.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

[redacted]6

No. ~~12~~, Original

UNITED STATES OF AMERICA, Plaintiff,

vs.

STATE OF CALIFORNIA, Defendant.

BRIEF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *AMICUS CURIAE*

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL.

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Dated: February 24, 1947.

INDEX

	PAGE
Statement	1
Introduction to Argument	3
POINT I—Plaintiff's complaint sets forth no tenable basis for any claim of title to submerged lands	4
POINT II—The development of the law shows that the States have title to submerged lands within their boundaries, including lands under coastal waters	8
A.—The common law conception of dominion of submerged lands under coastal waters	9
—Textwriters	10
—Colonial charters and statutes	14
B.—The States acquired the title of the Crown to submerged lands	20
C.—The doctrine of State ownership of lands under all navigable waters, including coastal waters, is definitely established by repeated pronouncements of this Court	26
D.—California and other States subsequently admitted entered the Union on an equality with the original States	41
POINT III—The States' ownership of the bed of the sea out to the limit of their jurisdiction has been asserted, and acquiesced in by the Federal Government, for over 150 years, and is binding on the Federal Government	45
A.—State constitutions, statutes and decisions	45
B.—Federal acceptance of grants from the States	54
C.—The Federal policy not to deprive the States of their submerged lands	57
POINT IV—The doctrine of State ownership of lands under coastal waters is an established rule of property, which this Court should not disturb	60
CONCLUSION	63

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PAGE

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Atkinson v. State Tax Commission, 303 U. S. 20 (1938) 8

Baer v. Moran Bros. Co., 153 U. S. 287 (1894) 25
Barker v. Bates, 13 Pick. 255 (Mass. 1832) 26
Barney v. Keokuk, 94 U. S. 324 (1876) 38, 58
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Best v. Polk, 18 Wall. (85 U. S.) 112 (1873) 54
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PAGE

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Lipscomb v. Gialourakis, 101 Fla. 1130, 133 So. 104 (1931) 51
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Missouri v. Iowa, 7 How. (48 U. S.) 660 (1849) 39
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PAGE

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PAGE

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Act of Congress, April 18, 1818 (3 Stat. 428), Illinois Enabling Act 47
Act of Congress, March 2, 1819 (3 Stat. 489, 490), Alabama Enabling Act 47
Act of Congress, June 15, 1836 (5 Stat. 49), Michigan Enabling Act 47
Act of Congress, August 6, 1846 (9 Stat. 56), Wisconsin Enabling Act 47
Act of Congress, September 7, 1850 (9 Stat. 452), admitting California 42
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United States Constitution, Art. I, Sec. 9, cl. 16 6

PAGE

United States Constitution, Amendment II 6
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33 U. S. C. A. Sec. 727 55
40 U. S. C. A. Sec. 255 57

STATE AND COLONIAL CONSTITUTIONS AND STATUTES

Alabama Constitution of 1819 47
California Constitution of 1849 .....42, 47
Florida Constitution of 1868, Art. I 48
Florida Laws of 1913, c. 6532, Sec. 1 48
Georgia Act 410 of 1916 48
Georgia Digest of Laws to 1800, pp. 35, 258, 264 46
Georgia Digest of Laws to 1800, p. 114 (Act of March 25, 1765) 20
Georgia Laws of 1902, p. 108 50
Louisiana Constitution of 1812 47
Louisiana Act 106 of 1886 50
Louisiana Act 121 of 1896 50
Louisiana Act 159 of 1900 50
Louisiana Act 30 of 1915 (Extra Sess. of Legis.) 50
Maine Acts of 1915, c. 330 48
Massachusetts Acts 1859, c. 289 47
Massachusetts Province Laws 1692-3, c. 32 (Act of Nov. 26, 1692), §§ 1, 2 18
Massachusetts Province Laws 1702, c. 12 (Act of Nov. 21, 1702) 18
I Acts and Resolves of Province of Massachusetts Bay 1, 19-20, 642 .....14, 20
Mississippi Act of 1858 55
Mississippi Constitution of 1817 47
Mississippi Laws of 1886, p. 180 50
I New Hampshire Laws 207 (Law of June 1, 1687) .. 18
II New Hampshire Laws 389, 526 18
III New Hampshire Laws 336, 525, 525-26 (Act of April 29, 1769) 19, 20
V New Hampshire Laws 766 (Act of June 16, 1791) 46
I Nevill 86, N. J. Acts 1718, c. XXX 18, 48
New Jersey Act of June 9, 1820, Sec. II (N. J. Digest of Laws 1838, p. 372) 48
New Jersey Act of December 10, 1825—Comp. Laws (1833) 124 48

PAGE

New Jersey Act of May 17, 1906 (P. L., p. 542) 48
New Jersey Laws of 1851, p. 335 51
New Jersey Stats. Annotated 50, 51
I New York Colonial Laws, p. 845 (Act of May 19, 1715) 18
II New York Colonial Laws, p. 1067 (Act of Dec. 16, 1737) 18
New York Laws of 1912, c. 318 50
New York Laws of 1945, c. 535 53
Oregon Laws of 1917, c. 276, p. 516 50
Pennsylvania Act of June 15, 1836 (5 Stat. 49) 45
Pennsylvania Act of June 25, 1913 53
Plymouth Colony Laws, Part I, 96-97 18
Plymouth Colony Laws, Part II, p. 205 18
Plymouth Colony Laws, Part III, 282 (Revised Laws, 1671), c. XI, §§ 2, 3 18
Acts and Laws of Rhode Island (1730) p. 9 .....15, 16
Rhode Island Digest of Laws, 1844, p. 533, Sec. 6 49
Rhode Island General Stats. 1872, Tit. I, c. I, Sec. 1 48
Rhode Island General Laws, 1909, c. 203 50
South Carolina Acts of 1896 56
Texas, Republic of, Act of December 19, 1836 47
Texas Laws of 1913, p. 409 53
Texas Laws of 1925 (1936 Rev. Civ. Stats. Art 4026, Acts 1925, p. 438) 50
Virginia Code, 1887, Sec. 1338 .....49, 50
Washington Act 225 of 1927, Sec. 142 50
Washington Constitution, Art. XVII, Sec. 1 47
Washington Constitution of 1889, Art. XXIV, Sec. 1 49

MISCELLANEOUS

House Doc. 804, 66th Cong. 2d Sess. 57
House Joint Res. 225, 79th Cong. 2d Session, 29 L. D. 395 58
Northwest Territory Ordinance (adopted by Congress of Federation on July 13, 1787) 42
7 Op. A. G. 314 57
8 Op. A. G. 172 57
34 Op. A. G. 428 57
Senate Report No. 1260 57
Treaty of Paris (1783) 58
Webster's New International Dictionary (1938 ed.) .. 21
33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 12, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

BRIEF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *AMICUS CURIAE*

Statement

The National Association of Attorneys General is an organization composed of the Attorney General of each State. One of the cardinal purposes of said Association is that of enabling its members, through cooperative and concurrent effort, to carry out their sworn duty of defending and protecting the interests of the States they respectively serve.

Notwithstanding the fact that the expressed purpose of this litigation is limited to establishing "the rights of the United States in the bed of the Pacific Ocean adjacent to the coast of California beginning at low-water mark and extending seaward for three nautical miles",[1]

[1] See Motion for Leave to File Complaint and Complaint, p. 2.

we observe on page 4 of the Statement in Support of Motion to file the complaint the startling assertion that neither the original thirteen States nor those subsequently admitted into the Union on an equal footing with the original thirteen, ever owned the lands underlying the three-mile belt; and the Government's brief repeats this contention (p. 10).

The assertion that the several States never owned the lands underlying their coastal waters is of sufficient importance in itself and in its implications to challenge the grave concern of all of the States and the Attorneys General representing them.

This action attempts in effect to force the uncompensated transfer to Federal ownership by judicial decree of a considerable portion of the resources of a State.

Plaintiff evidently intends, even though the complaint describes only one State, to undertake to establish title to the submerged coastal lands of all of the States. For that reason this Association has requested permission to present its views on the issues involved.

The surprise, and even alarm, which have followed the Government's assertion that none of the States ever owned the submerged lands underlying their coastal waters,[2] has not been mitigated by the pronouncement found on page 2 of the Statement in Support of Motion, that this suit does not involve any bays, harbors, rivers or other inland waters; for, in attacking the title of the States to lands beneath coastal waters, the Plaintiff is at the same time attacking the authority of the cases in which this Court has recognized the title of the States to

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[2] We shall use the term "submerged lands" in referring to land below low-water mark, and specifically those lands claimed by Plaintiff in its Complaint, and "coastal waters" in referring to waters sometimes described as within the maritime belt, the three-mile limit, or the marginal sea.

submerged lands underlying inland navigable waters. Indeed, the Government now asserts that this long line of cases is unsound! (Brief, pp. 11, 72).

To support its theory, Plaintiff begins by asking this Court to *sever* the principle governing coastal waters from the broad principle of law laid down by this Court in numerous decisions affirming title in the littoral States to lands underlying *all* navigable waters. Yet halfway through its brief Plaintiff admits that it is attacking the *whole* principle which has up to the present time recognized State ownership of navigable waters and the lands underlying them as an incident of State sovereignty. Acceptance of Plaintiff's views would impair even the legal basis which has hitherto supported the title of both coastal and inland States to the beds of navigable waters in bays, harbors and rivers.

To obviate the prolixity of pointing out those recognized differences among the several States in matters affecting the inception of sovereignty or relating to the proprietorship of lands within their boundaries, the National Association of Attorneys General will restrict itself, insofar as it is reasonably possible, to legal principles and facts of uniform application to all of the States, without prejudice to any State or States that may have additional grounds for establishing title.

Introduction to Argument

Since the present case is before the Court at this stage "on the pleadings" (Govt. Br., p. 6), we shall show first that the complaint sets forth no tenable basis for a claim of Federal ownership of submerged lands (Point I, *infra*).

We shall next show the early origins of the title of the States, and of the colonies before them, to the lands under navigable waters, including coastal waters, and the repeated assertion of that title in legislative acts, treatises and judicial opinions (Point II, *infra*). This will make

plain the error of the Government's contentions that the theory of ownership within coastal waters is a new concept (Govt. Br., p. 7) and that the Original Thirteen Colonies never claimed ownership in the submerged lands under coastal waters (Govt. Br., p. 10).

We shall next show that the Federal Government has acquiesced in the States' ownership in coastal waters for so long that the point is no longer open to dispute (Point III, *infra*). This is not simply a claim of estoppel, as the Government seems to treat it (Govt. Br., p. 12), but an instance of practical construction and long-continued recognition evidencing an established rule of property that should not be overturned.

Finally, we shall show that an attempt to lay down a new rule for submerged lands under coastal waters, different from that which the Government concedes has always been applied in bays, harbors and inland navigable waters, would open a Pandora's box of complexity and trouble (Point IV, *infra*).

ARGUMENT

POINT I

Plaintiff's complaint sets forth no tenable basis for any claim of title to submerged lands.

Plaintiff's claim that it has title to submerged lands under coastal waters of California and the other States, including the Original Thirteen States, is not based on any deed or cession from the States. It is not based on case law, for the cases all hold that title to submerged lands is in the States. It is not based on statute, for Congress has passed no statute purporting to give the Federal Government any title to submerged lands. Nor, as we shall show, is there any basis for the Federal Government's claim in the United States Constitution.

The lack of informing averments in the present complaint, relative to the origin and nature of Plaintiff's title, leads us to question whether it has any foundation at all for the claim it makes. To justify our position in making this statement, we make the following observations:

1. Plaintiff says in its Statement (p. 3) that its rights in submerged lands under coastal waters have never been adjudicated by this Court. This really is an admission that, even if all the cases asserting State title to submerged lands were explained away (which clearly cannot be done), there still is no decision which affirms Federal ownership of lands in coastal waters.

Were it true that this Court in the course of a century and a half had made no such adjudication, it would not help Plaintiff's case. It would only afford additional evidence that State ownership is the established rule and thus still further discredit Plaintiff's present claim. See Point III, *infra*. In other words, the Federal Government has been unconcerned or resigned to the property rule of State ownership for a period long enough to clothe its present assertion of title with a fair degree of skepticism.

2. Plaintiff's claim of title cannot be founded upon the assertion in its Statement in Support of Motion to file Complaint (p. 4), that it is the function of the Federal Government to establish and vindicate rights in the three-mile belt "against the possible claims of other nations." In its brief, the Government similarly urges that rights in the "three-mile belt" "may be vindicated as against other nations only by the national government" (p. 10).

This proves nothing unless the coastal seas are different in this respect from bays, harbors and inland waters, where concededly the States own the soil. It is clear that they are not different. The national government maintains forts within harbors for the defense of the States'

territory, and "vindicates" the rights of the States in boundary rivers. In fact, even matters of disputed boundaries on dry land are "vindicated" by treaties negotiated by the national government.[3]

The States delegated to the Federal Government the defense of all their territory, upland as well as submerged lands, although reserving rights with respect to their own militia. (See United States Constitution, Art. I, Sec. 9, cl. 16; Am. II.) Yet the fact that the Federal Government defends the uplands cannot be said to afford a basis for a Federal claim of title to territory within a State. By the same reasoning, the fact that it may be within the power of the Federal Government to vindicate the rights of the States within coastal waters against the possible claims of other nations is no basis for claiming title thereto in the Federal Government. In fact, the Constitution recognizes that the Federal Government must depend on cessions from the States to obtain land even for forts and other buildings needful to accomplish Federal purposes. (United States Constitution, Art I, § 8, cl. 17.) A cession of oceanfront land to the Federal Government for military purposes does not give the United States title to the adjoining lands under the sea, nor does its use of such waters impair the State's rights and jurisdiction in the territorial waters. *Hamburg American Steamship Co.* v. *Grube,* 196 U. S. 407 (1905).

3. Instead of alleging definitely fee simple title, Plaintiff avers alternatively in its complaint (Par. II) that it is either the owner of fee title to "or possessed of paramount rights in and powers over" the lands. The Federal government's paramount rights in certain specific fields are in no wise inconsistent with State ownership.

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[3] See, e. g., Griswold, *Hunting Boundaries with Car and Camera in the Northeastern United States* (1939) 29 Geographical Review 353, 372-82.

The United States Constitution, while giving the Congress certain powers of regulation of interstate and foreign commerce, confers no title on the United States to any lands under coastal waters or elsewhere.

Recognizing that the Constitution did not transfer to the United States any of the lands under navigable waters belonging to the original States, this Court held in *Mumford* v. *Wardwell*, 6 Wall. (73 U. S.) 423, 436 (1867):

> "Settled rule of law in this Court is, that the shores of navigable waters and the soil under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States".

This settled rule was again repeated in *County of St. Clair* v. *Lovingston*, 23 Wall. (90 U. S.) 46, 68 (1874).

"Paramount rights" and fee title are not equivalent claims. The power to regulate commerce and improve navigation, and the power to adjudicate cases in admiralty, are both "paramount", but the delegation of these powers is not and cannot be construed as a cession of the lands underlying navigable waters. This was specifically ruled in *United States* v. *Bevans*, 3 Wheat. (16 U. S.) 336, 388 (1818), wherein this Court held that the United States could not have exclusive jurisdiction in Boston Harbor unless Massachusetts had ceded the harbor, and that cession could not be deduced from the grant of admiralty and maritime jurisdiction in the Constitution. "This", said Chief Justice Marshall, "is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction." The same ruling was made as to the defense power in the *Hamburg-American* case, (*supra*, p. 6).

In *Corfield* v. *Coryell*, 6 Fed. Cas. 551, No. 3230 C. C. Pa. 1823), Washington, Circuit Judge, held that the com-

merce power did not interfere with New Jersey's right to regulate oyster fishing in New Jersey waters, and gave the same reason (p. 551):

> "The grant to congress to regulate commerce on the navigable waters belonging to the several states * * * contains no cession, either express or implied, of territory or of public or private property."

Regulatory powers granted to the Federal Government are applicable throughout a State's territory, and have no relation to Federal ownership of land. Even when the United States exercises its control over navigation by building a dam in the bed of a navigable river, the bed of the river thus used by the Federal Government does not become Federal property unless the State cedes it. (*James* v. *Dravo Contracting Co.*, 302 U. S. 134, 140-1 (1937); *Atkinson* v. *State Tax Commission*, 303 U. S. 20, 22 (1938).) Moreover, the commerce power and the other powers cited by the Government (Br., p. 85) operate within harbors and on dry land, and are not peculiar to coastal waters or the soil under them.

Not only is the complaint inadequate to support a claim of Federal ownership, but we shall go on to show affirmatively that the Original Thirteen States and those admitted into the Union later "on an equal footing" have an irrefragable title to the land under all their navigable waters, inland or coastal. (Points II and III below.)

POINT II

The development of the law shows that the States have title to submerged lands within their boundaries, including lands under coastal waters.

At common law, before the Revolution, submerged lands under navigable waters, including coastal waters, belonged to the Crown, despite Plaintiff's attempts to explain

away the repeated declarations of the rule. By the Declaration of Independence, the original thirteen colonies acquired ownership of these lands from the Crown. All States subsequently admitted have come into the Union on an equal footing with the Original Thirteen, including ownership of submerged lands under their coastal waters and other navigable waters. The course of decisions in Federal and State Courts for a century and a half uniformly supports this rule.

A. The common law conception of dominion of submerged lands under coastal waters.

Plaintiff is forced to admit that authorities prior to the Revolution quite generally asserted title in the Crown to the lands under coastal waters (Govt. Br., pp. 7, 24-25, 116-17), and that most publicists in modern times recognize the littoral state's ownership of the subsoil of coastal waters (Govt. Br., pp. 31-32). In order to justify its argument that the Original Thirteen States did not succeed to the King's ownership of such submerged lands, Plaintiff is forced to argue that the present recognition of ownership is based on a different theory from the old claims, and that the present concept is "wholly independent" of the old claims (Govt. Br., p. 26)—although this "modern" doctrine stems back to 1702 (*ibid*).

This is a fallacious distinction. Rights within coastal waters today are the same rights asserted long before the Revolution, and are based on the same basic concepts of possessory control and appropriation of the products of the adjacent sea and of the land under it. The definition of the *width* of coastal waters as three miles (a temporary manifestation, not uniformly applied at any time) is merely a limit in space imposed upon the wider claims of earlier times. The adoption of this limit for certain purposes cannot operate to transfer to the Federal Government the ownership of the soil which had been first in the King and then in the Colonies and the States.

Textwriters

The fact that sovereignty over the sea is now more limited than was once claimed does not mean that ownership of coastal waters is something new. Judge Bustamante has pointed out that "There was territorial sea when high seas were not free. * * * It is very important that this historical truth be not lost sight of * * *". *The Territorial Sea* (1930) 6.

Until the Seventeenth Century, nations laid claim to great expanses of sea.[4] Later, the tendency was to limit the breadth of coastal water by the extent of actual possession effected by physical control through coast artillery.[5] This limitation later crystallized into a rule of thumb under which independent states were recognized as the owners of submerged lands extending three miles from their coast. Still later, the doctrine became severed from its original factual basis, and the three-mile limit was retained as a convenient measure for certain purposes even after the range of cannon increased.

All pre-revolutionary English textwriters uniformly asserted the King's ownership of the bed of the ocean surrounding the British Isles,[6] sometimes described as the "narrow seas".[7] In making these assertions of title, they

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[4] Hall, International Law 1880) Sec. 40, pp. 125-27, *id.* (8th ed 1924) pp. 189-92; Fulton, The Sovereignty of the Sea (1911) 25-517.

[5] Fulton, *supra,* pp. 537, *et seq.*

[6] Bracton, *De Legibus et Consuetudinibus Angliae* (1569), lib. 2, c. 2, fol. 9b (I Swiss ed. 71, 73); Selden, Dominion of the Sea (1652) g 2, Bk II, pp. 251, 274-75, 365-66, 384-85; Callis on Sewers (2d ed. 1685) pp. 39, 41-42, 44, 53; Bacon's Abr. (3d ed. 1768) Bk. 1, 623n.; Bk. 4, 153, 156, 157; 2 Blackstone's Comm. (3d ed. 1768) 261-2. See also Hall (R. G.), Rights of the Crown in the Sea-shores of the Realm (1830) in Apdx. to Answ., pp. 28-31.

[7] Hale, *De Jure Maris* (circ. 1676), c. IV, pp. 10-11, c. VI, p. 31, in Hargrave's Law Tracts (1787); 1 Roll. Abr. 528 (1668).

were fully consistent with the views then and later approved by writers on international law.

As early as 1598, Albertico Gentili, an eminent contemporary of Francis Bacon and the precursor of Grotius, clearly expressed the concept that a maritime nation owns its coastal waters.[8]

> "The Argives once expostulated with the Athenians, because the Athenians had allowed the Spartans, who were enemies of the Argives, to pass over their sea, although it was provided in the treaties, that neither should allow the enemy to pass through the places which were under their control. The remonstrance was justified, since the sea is a portion of the land, * * * as our jurists admit. *The adjacent part of a sea belongs to one's dominion, and the term 'territory' (territorium) is used both of land and water.*"[9]

A quarter of a century later Grotius, in expounding the freedom of the seas, yet conceded that "sovereignty over a part of the sea is acquired * * * in so far as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be upon the land itself * * *".[10]

The reasons for the allowance of ownership in the marginal sea were stated by Pufendorf in 1660 and 1672 as being based on fishing and the defense of the region.[11]

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[8] Gentili, *De Jure Belli* (1598) Bk. III, c. XVII 629. (Trans of 1612 ed. in Classics of International Law, 1933, p. 384.)

[9] Italics throughout the brief are ours, unless otherwise noted.

[10] Grotius, *De Jure Belli ac Pacis* (1625) Book II, c. III § XIII, p. 130 (Kelsey trans. of 1646 ed. in Classics of Int. Law, 1925, p. 214); id. § IX, pp. 128-29, trans. p. 210.

[11] *Elementarium Jurisprudence Universalis* (1660) Book I, p. 31 (Trans. of 1672 ed. in Classics of Int. Law, 1931, p. 28); *De Jure Naturae et Gentium* (1672) Book IV, c. V, pp. 383-84, 385 (Trans. of 1688 ed. in Classics of Int. Law, pp. 562, 565).

Ownership was more than once attributed to the possibility of exclusive appropriation by the littoral state,[12] and justified because of the possibility that the resources of the ocean-bed might otherwise be exhausted.[13] We shall show hereinafter (pp. 17, 44, *et seq.*) that the colonies before the Revolution and the States immediately afterward repeatedly exerted their ownership in coastal waters for the preservation of fisheries, pursuant to the same principle set forth by Pufendorf.[14]

In 1703 Cornelius Van Bynkershoek suggested that the extent of effective appropriation in his day was the extent of cannon range. That, he said, "is as far as we seem to have both command and possession. I am speaking, however, [he warned] *of our own times,* in which we

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[12] Vattel, Law of Nations (1758) Book I, c. XXIII, § 289 (Fenwick trans. in Classics of Int. Law, 1916) pp. 108-09; Selden, Dominion of the Sea (2d ed. 1652) Bk. II, pp. 288, 298, 357, 363-70, 373-75, 441-42; Hale, *De Jure Maris, supra,* note 7, p. 10; Von Martens, Law of Nations (1789) c. IV, § 10, *id.* (1st Am. ed. 1795) p. 165. Hall (W.E.), International Law (8th ed. 1924) 189 states the same proposition in modern terms. He treats the disappearance of "extravagant pretensions" as based on recognition that possession of vast seas was found to be unreal, but asserts that the marginal sea is capable of appropriation and "is always appropriated" (p. 190).

[13] See, e. g., Vattel, Law of Nations (London, 1758; Fenwick trans. in Classics of International Law, 1916) Book I, c. XXIII, § 287.

> "The various uses to which the sea near the coasts can be put render it a natural object of ownership. Fish, shells, pearls, amber, etc. may be obtained from it. Now with respect to all those things, the resources of coast seas are not inexhaustible, so that the Nation to which the shore belongs may claim for itself an advantage thus within its reach and may make use of it, just as it has taken possession of the lands which its people inhabit." (p. 107 of Fenwick transl.)

See also Selden, Dominion of the Sea (2d ed. 1652) Book I, c. XXII, p. 141; Pufendorf, *De Jure Naturae et Gentium, supra,* note 11, pp. 383-84.

[14] The works of Grotius, Pufendorf and Vattel were among the staple readings of American lawyers at the time of the Revolution. (Reeves, The Influence of the Law of Nature (1909) 3 Am. J. of Int. Law 547, 549-52.)

Chief Justice Marshall and Justice Story referred to Bynkershoek, Grotius, Pufendorf and Vattel as familiar authorities in early cases, e.g., *The Nereide,* 9 Cranch 388 (1815).

use those engines of war; otherwise I should have to say in general terms that the control of the land ends where the power of men's weapons ends; for it is this, as we have said that guarantees possession".[15]

By the time of the Revolution, the range of guns actually in place on the shore was approximately one marine league and the distance within which the State could then assert control over its coastal waters formed the original basis for the present minimum three mile dominion of coastal water.[16] It furnished, indeed, the legal foundation for Lord Stowell's decision in *The Anna* where, after paraphrasing Bynkershoek's formula, he said that since the introduction of firearms, the boundary of territorial waters "has usually been recognized to be about three miles from the shore".[17] This assimilation of the cannon shot range to the three mile distance of coastal waters persisted—for the nations that adopted it—long after the science of ordnance had considerably extended the range of artillery.

Ownership of the bed of coastal waters is confirmed by the treatises most nearly contemporary with the Revolution. Von Martens in 1795 declared:[18]

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[15] *De Dominio Maris* (1703) 364 (trans. of 1744 ed. in Classics of Int. Law, 1923, p. 44); see also his *Quaestionum Juris Publici* (1737) lib. 1, c. VIII, p. 59: "*imperium terrae finiri, ubi finitur armorum potestas.*"

The history of the doctrine of cannon range, and the ownership of subsoil by the littoral state is also discussed in Raestad, *La Mer Territoriale* (1913) c. I-VIII passim; Fraser, The Extent and Delimitation of Territorial Waters (1926) 11 Corn. L. Q. 455, 457-58.

[16] Von Meyer, The Extent of Jurisdiction in Territorial Waters (1937), shows the variety of widths adopted by various nations at various times for various purposes.

[17] (1805) 5 C. Rob. 373, 385, 165 Eng. Rep. 809.

[18] Von Martens, Law of Nations (Cobbett transl., Philadelphia 1795) 165-66. See also Angell, Right of Property in Tide Waters, and in the Soil and Shores Thereof (Boston, 1826) 18-20, 37-38; 1 Kent's Commentaries (New York, 1826) 29; Hall (R.G.), Rights of the Crown in the Sea-Shores of the Realm (1830) 1-7, Apdx. to Answ., pp. 28-31; Wheaton, Elements of International Law (1836) 142-3.

"The sea surrounding the coast, as well as those parts of it which are land-locked, such as the roads, little bays, gulphs, etc., as those which are situated within cannon shot of the shore (that is, within the distance of three leagues), are so entirely the property, and subject to the dominion, of the master of the coast, that he has the exclusive right to all the produce of it, whether ordinary or accidental, as far as relates to things unclaimed by any other lawful proprietor. * * * In short, *these parts of the sea surrounding the coast, ought to be looked upon as forming a part of the territory of the sovereign who is master of the shore.*"

Colonial charters and statutes

Examination of colonial charters and statutes show an awareness of the rights in coastal waters, quite contrary to the assertion of the Government that "in none of them is there any reference to the marginal sea" (Br. p. 141).

The Plymouth Colony charter of 1620 granted:

"all the Main Lands from Sea to Sea together also with all the firme Lands *Soiles* Grounds Havens Ports Rivers *Waters Fishings* * * * and all and singular other Comodities Jurisdicions *Royalties* Privileges Franchises and Preheminences both within the said Tract of Land upon the Main and alsoe *within the Islands and Seas Adjoining* * * *" (I Acts and Resolves of Province of Massachusetts Bay 1; Apdx. to Answ., pp. 40-41).[19]

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[19] California's original three-volume answer is referred to in this brief as Apdx. to Answ.

With respect to this charter, which shows the pattern of most of the other colonial charters,[20] Gould on Waters (3d ed. 1900) states that (pp. 70-71):

> "the other words employed, and especially the word 'royalties', in connection with the manifest purpose of the grant, were held to convey to the colonial governments the right and jurisdiction of the Crown in the shores of navigable waters, and in the soil under such waters".

The Rhode Island charter granted by Charles II in 1663 follows the same principle, in that it reserves to British subjects "full and free power and liberty to continue and

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[20] This common pattern is followed in the Virginia charters of 1609 and 1611-12 (2 Poore, Federal and State Constitutions (1878) 1897, 1903; Apdx. to Answ., p. 39); New Hampshire grant of 1629 and New Hampshire charter of 1635 (2 Poore, pp. 1271, 1273; Apdx. to Answ., pp. 46-7); Maryland charter of 1632 (1 Poore, p. 812; Apdx. to Answ., p. 50); Connecticut charter of 1662 (1 Poore, p. 257; Apdx. to Answ., p. 48); Rhode Island charter of 1663 (2 Poore, p. 1602); Carolina charters of 1663 and 1665 (2 Poore, pp. 1383, 1390-1; Apdx. to Answ., pp. 51-2); 1664 grant to James, Duke of York (1 Poore, pp. 783-4; Apdx. to Answ., pp. 49-50); 1674 grant to James, Duke of York (1 Poore, p. 786; mentioned, Apdx. to Answ., p. 50); Massachusetts Bay charter of 1691 (1 Poore, p. 947; Apdx. to Answ., p. 43); Georgia charter of 1732 (1 Poore, p. 373; Apdx. to Answ., pp. 53-4). A variant, with even greater emphasis on ownership in sea areas, is the Maine grant of 1639 (1 Poore, p. 775, partly in Apdx. to Answ., pp. 43-4):

> "Alsoe the north half of the Isles of Shoales together with the Isles of Capawock and Nawtican neere Cap Cod as also all the islands and iletts lyeing within five leagues of the Mayne all along the aforesaid Coasts * * * with all and singular the *Soyle* and *Grounds thereof as well drye as covered with water* and all waters Portes Havens and Creeks of the Sea and Inletts of the said Province of Maine * * * together with the Fising of whatsoever kinde as well Pearle as Fishe as Whales Sturgeons or any other either in the Sea or Rivers * * * And all Gould Silver Pearle Precious Stones and Ambergreece which shall be founde within the said Province and Premises * * * and Coasts of the same or any of them."

use the Trade of Fishing upon the said Coast *in any of the Seas thereunto adjoining* * * *", and provides "that if any of the inhabitants of said Colony * * * be industrious in the Discovery of Fishing Banks in and about the said Colony, we will from time to time give and allow all due and fitting Encouragement therein, as to others in cases of like Nature * * *" (Acts and Laws of Rhode Island (1730) p. 9). The Connecticut charter of 1662 and the Massachusetts Bay charters of 1629 and 1691 contained the same reservation (1 Poore, Federal and State Constitutions [1878] 256, 941-42, 947).

With respect to such reservations of the right of fishery, Angell said in his treatise on Tide Waters (1826):

> "* * * By a reservation of this kind, it is clear that the king considered himself as the undoubted and legal proprietor of the tide waters; for if he had not thus considered, then to qualify his grants by such a reservation was manifestly absurd" (p. 38).

Other colonial charters, set forth in the appendix to California's answer, likewise contain specific mention of the adjoining seas, or of lands, soils, waters, fishings, royalties, and other provisions designed to convey the king's title in the beds of coastal waters.[21]

The charters granting all islands within a specified distance of land are also relevant, for the common law based the ownership of islands upon the ownership of the ocean

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[21] 1584 charter to Sir Walter Raleigh (Apdx. to Answ., pp. 36-37); 1629 Massachusetts charter (Apdx. to Answ., pp. 41-42); 1632 charter of Maryland (Apdx. to Answ., pp. 50-51); 1662 charter of Connecticut (Apdx. to Answ., p. 48); 1663 and 1665 Carolina charters (Apdx. to Answ., pp. 51-52); 1732 charter of Georgia (Apdx. to Answ., pp. 53-54). The 1691 Massachusetts Bay charter fixes limits that take in coastal waters (1 Poore, p. 947).

bed.[22] The 1691 charter of Massachusetts Bay Colony granted all islands within "tenn Leagues directly opposite to the Main Land" (Apdx. to Answ., p. 43). Similarly, the Virginia charter of 1609 grants all islands "within one hundred miles along the Coast" (Apdx. to Answ., p. 39), the New Hampshire charter of 1635 all islands within "five leagues distance" (Apdx. to Answ., p. 47), and the Georgia charter all islands "within twenty leagues" (Apdx. to Answ., p. 54), to cite but a few examples. The inclusion of these islands necessarily included sea areas.[23]

An early statute expressing the same principle of ownership within coastal waters is the enactment of the Plymouth General Court in June 1652 that:

> "* * * if any man take a drift whale of att the sea and bring or tow it to the shore, it [shall] be accounted his owne goods; but *if within a harbour or mile of the*

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[22] See Blackstone's Commentaries (3d ed. 1768) Bk. II, 261-62:

> "in case a new island rise in the sea, though the civil law gives it to the first occupant, yet ours gives it to the king. And as to lands gained from the Sea, either by alluvion * * * or by dereliction * * * if the alluvion or dereliction be sudden or considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable that he should have the soil, when the water has left it dry."

See also Hall, Rights of the Crown in the Sea-Shores of the Realm (Apdx. to Answ., pp. 28-31); *Secretary of State for India* v. *Chelikani Rama Rao*, L. R. 43 Ind. App. 192, 32 T. L. R. 652 (P. C. 1916).

[23] See the modern calculations of a State's three mile limits where islands are involved. *Bosarge* v. *State*, 23 Ala. App. 18, 121 So. 427 (1928), cert. den., 219 Ala. 154, 121 So. 428 (1929), cert. den., 280 U. S. 568 (1929); *Ex parte Marincovich*, 48 Cal. App. 474, 192 Pac. 156 (1920); *State* v. *Ruvido*, 137 Me. 102 (1940).

shore they be taken they be reputed the townships where they are brought on shore."[24]

An act of the General Court of Plymouth Colony, in July, 1684, took note of the damage done from catching mackerel with seines "att Cape Codd or else where *near any shore* in this Colonie", and enacted that no person should "catch or draw on shore any mackerell, with nett or netts, sayne or saynes in any parte of this Colonie." (Plymouth Colony Laws (1836) Part II, p. 205). Many other colonial fishing regulations[25] testify to the importance which that industry had in early times, and thus to the reality of the colonies' concern with jurisdiction of coastal waters.

These fishing regulations take on added importance in the light of this Court's statement that control over fisheries is part of the "territorial jurisdiction" of a State (*Manchester* v. *Massachusetts,* 139 U. S. 240, 258), and that it is founded upon ownership of the underlying land (*McCready* v. *Virginia,* 94 U. S. 391, 394).

There are examples of other exercises of jurisdiction in coastal waters during colonial times. A grant made under a 1707 Rhode Island statute, referred to in *Armour & Co.* v. *City of Newport,* 43 R. I. 211, 110 Atl. 646

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[24] Plymouth Colony Laws, Part I, 96-97. See also id., Part III, 282 (Revised Laws, 1671, c. XI, § 2):

> "* * * all such Whales as are cast up within the Bounds of any particular Township, or floating upon the stream, within a Mile of the Shoar, against the said Bounds of any Township, shall be accounted the respective Towns falling within their Bounds as aforesaid * * *."

[25] Plymouth Colony Laws (1836), Part III, pp. 282, 283-4, Revised Laws 1671, ch. XI, §§ 3, 4; I N. H. Laws, (1679-1702) 207, Law of June 1, 1687; Mass. Province Laws 1692-3, c. 32, Act of Nov. 26, 1692, §§ 1, 2; Mass. Province Laws 1702, c. 12, Act of Nov. 21, 1702; 1 Nevill 86, N. J. Acts 1718, c. XXX; I N. Y. Colonial Laws, p. 845, Act of May 19, 1715; II N. Y. Colonial Laws, p. 1067, Act of Dec. 16, 1737; see *Arnold* v. *Mundy,* 1 Halst. (6 N. J. L.) 1, 91-92 (1821).

(1920), conferred the right to build a wharf for eight hundred feet beyond low water mark.

To combat erosion on an exposed beach at Rye, New Hampshire, the General Assembly of that colony in 1763 passed "An Act to Enable the owners of a Piece of Marsh or thatch ground lying in the Parrish of Rye Called Sandy Beach, to Finish a Wharfe to Prevent the Tide from carrying away said Beach" (III N. H. Laws (1745-74) 336). The Muscongus grant of March 13, 1629, made by the New England Council under the 1620 Plymouth charter covered lands on the coast of Maine, "together with all Sd land yt ly & be within ye Space of Three miles within ye Space of Sd land & Prmisses or any of them". This grant included islands within the three-mile space from the mainland. See *Lazell* v. *Boardman,* 103 Me. 292, 294, 69 Atl. 97, 98 (1907); Farrow, *History of Islesborough, Maine* (1893) 1-2.

A square ruling that the province of New York included coastal waters outside the harbor was made by the colonial Supreme Court in the case of *Kennedy* v. *The Sloop Mary & Margaret Thomas, Fowles Reclaimant* in 1739.[26] The sloop had transferred foreign gunpowder and molasses to a pilot boat at a point between Sandy Hook and the Narrows. The goods having been seized on the pilot boat and a libel filed against the sloop in the Court of Admiralty, the owner of the sloop applied for a writ of prohibition on the ground that the offence was committed within a county and the Admiralty Court therefore had no jurisdiction. His argument that "the whole Colony of New York is divided into twelve counties and that there is no part of said Colony but is contained in the said Counties or one of them", was sustained by the Supreme Court, as against the Advocate General's argu-

[26] See 6 O'Callaghan, Documents Relative to the Colonial History of New York (1855) 154-55. It is also of interest that the southwestern corner of the province of New York was in the waters of Lake Erie, 8 *id.* 434, 438.

ment that the counties nearest to the place where the illegal transfer took place were "bounded by the waters". In other words, the court held that the county boundaries included waters outside the harbor.

Some of the boundaries fixed by the colonies specifically included water" and nearby islands."

It will thus be seen that sovereign ownership in the coastal seas has always been part and parcel of the law of sea rights. The freedom of the seas has not affected this right, but only curtailed any extravagant extensions of it. When we turn from International Law to the law of England and the English colonies up to the time of the Revolution, we find the proprietary right of the Crown in the coastal waters and the bed of the sea was likewise firmly established.

B. The States acquired the title of the Crown to submerged lands.

Under English rule the thirteen colonies were free and independent of each other. In separating from England they maintained their character as separate independent states, and each acquired the King's former title to all land within its boundaries, including submerged lands under coastal waters.

By the Declaration of Independence, in July 1776, the several colonies, united for purposes of common defense, asserted their new character as "Free and Independent States." As such states, they succeeded to all rights which the British Crown had ever possessed. Their ownership of land was confirmed by the treaty which ended the Revolution, and was never surrendered to the Federal

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" I Acts and Resolves of the Province of Massachusetts Bay 642 (Province Laws 1709-10, c. 4).

" III New Hampshire Laws (1745-74) 524, 525-26 (Act of April 29, 1769); Georgia Dig. of Laws to 1800, p. 114 (Act of March 25, 1765).

Government. When the thirteen States formed the Union they had already existed as sovereign States, and in forming the Union they brought with them the sovereignty that they had enjoyed, reserving all of the same except that which was surrendered to the Federal Government.

The Articles of Confederation, which were adopted only one year later, provided in Article II thereof:

> "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

These Articles, establishing the conditions on which the independent colonies joined their efforts for mutual defense, thus expressly restated the reservation by the individual States of their respective "sovereignty, freedom and independence."[*]

The Treaty of Peace with Great Britain in 1783, generally referred to as the Treaty of Paris, followed by several years the Declaration of Independence, and in it we find this language:

> "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia to be free, sovereign, and independent states; that he treats with them as such, and for himself, his heirs, and successors, relinquishes all claims to the Government, propriety and territorial rights of the same, and every part thereof."

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[*] Provisions which would have authorized the Congress to limit or ascertain the bounds of any Colony were expressly rejected (3 Journals of the Continental Congress 681-82; 9 id. 836-39; Burnett, The Continental Congress (1941) 370, 501), thus emphasizing the States' retention of their territory in the absence of voluntary cession.

This Treaty reiterated the separate sovereignty of the individual States and a definite intention to deal with these "free, sovereign and independent states * * * as such."

The boundary in the Treaty, embracing all islands within twenty leagues of the shore (Govt. Br., p. 110), certainly relinquished all the King's rights in coastal waters.

Since we have seen that sovereign ownership of coastal waters had been definitely established before the Revolution, the King's relinquishment to the "free, sovereign and independent States" of "all claims to the government, propriety and territorial rights of the same" clearly gave the Original Thirteen States full rights in their coastal waters and the lands beneath them. Those rights had already been fully established both in international law and by English law.

With even greater care and caution than that exercised in drafting the Articles of Confederation, the original thirteen States spoke their will and determination, relative to the reservation of sovereignty, when the Constitution of the United States was adopted. Pursuant to requests by the conventions of the States which ratified the Constitution, ten amendments were offered at the session of the First Congress in 1789, expressly designed to show the reservation of state rights and sovereignty, except such as were specifically granted by them to the United States in the Constitution. Amendment X is illustrative:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The preamble to the first ten amendments indicates that these amendments expressed views pronounced by a number of the States at the time they adopted the original

Constitution, in order to prevent misconstruction of the Federal Government's powers.

We recognize that the States entrusted certain external powers to the central government even under the Articles of Confederation,[31] and that broad powers with reference to foreign affairs were granted in the Constitution. Nevertheless the fact remains that such grants of power were not cessions of territory and the Federal Government acquired no title to land within any State's boundaries by either of these documents or under any other grants from the individual States, except the cessions of the Northwest Territory to the Congress of the Confederation and except grants made specifically under Article I, Section 8 of the Constitution.

For title sources thus we see that the several States (1) asserted complete sovereignty in the Declaration of Independence; (2) expressly reserved that sovereignty in the Articles of Confederation; (3) received a veritable quitclaim of all of Great Britain's territorial rights by the treaty of peace; and (4) again reserved their sovereignty and ownership in the Constitution.

There was no interval after the Revolution during which coastal waters were without an owner and claims thereto lay dormant, to emerge later in a new and independent form, as the Government's theory assumes.

Jefferson's note in 1793, announcing that the United States would exercise its territorial protection for three geographical miles from the seashore, and interpreting that as the utmost range of a cannon ball, was in no way

[31] This is all that the Court said in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936), which the Government cites repeatedly (Br., pp. 75, 76, 78, 90, 157). Ownership of submerged lands under coastal waters does not depend upon external sovereignty. It is a rule of property law, as recognized in the long series of decisions in this Court cited hereinafter (pp. 27-35, *infra*).

inconsistent with the States' territorial ownership, as the Government vainly contends (Br., pp. 130-34). He based his conclusion upon the previous authorities, which we have seen recognized ownership in coastal waters; his note merely fixed for the time being the limits of the claims which this country would protect, just as it protects islands, shore and upland. It had become a rule of law by this time, regardless of the historic appendant reason,[30] that a State had territorial dominion over submerged lands lying seaward from the shore to a distance of at least three miles, just as the British Crown had held title to the beds of all navigable waters within the jurisdiction of the Crown.

This Court from an early time has recognized and affirmed that the States and not the Federal Government acquired as a result of the Revolution whatever title the Crown had ever possessed. As was said in *Harcourt* v. *Gaillard,* 12 Wheat. 523, 526 in 1827:

> "There was no territory within the United States that was claimed in any other right than that of some one of the confederated States."

In *Martin* v. *Waddell,* 16 Pet. (41 U. S.) 367, 410 (1842), in dealing with oyster fisheries under the navigable waters of Raritan Bay, and below low water mark,[31] the Court stated:

> "when the Revolution took place, the people of each State became themselves sovereign; and in that

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[30] The range of cannon no longer determined dominion. *Cleavage had occurred between the rule and the reason.*

[31] It is apparent that the land involved in the *Martin* case was below the low-water mark, not alone by the use of the words "navigable waters," but also by the fact that oysters are grown only under salt water and not on the foreshore where they would be subject to exposure at low-tide. See Nelson's Perpetual Loose-Leaf Encyclopedia under heading "Oyster."

> character held the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. * * *"

In referring to the soil under navigable waters, this Court clearly included lands below low water mark.

The Court further held:

> "when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the Parliament, became immediately and rightfully vested in the State" (16 Pet. at 416).

To the same effect Mr. Justice Field stated in *Weber* v. *Board of State Harbor Commissioners,* 18 Wall. (85 U. S.) 57, 65 (1873) that by the common law:

> "the title to the shore of the sea, and of the arms of the sea, and in the soils under tide waters, is, in England, in the King, and in this country, in the state."

Thereafter, in *Shively* v. *Bowlby,* 152 U. S. 1, 14 (1894), the Court sustained a State grant of tidelands[33] as against

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[33] Tide lands are not restricted to lands above low-water mark, as the Federal Government asserts (Br. p. 19). That definition was *not* endorsed by this Court in *Walker* v. *State Harbor Commissioners* (17 Wall. at 651), nor does the other case that the Government cites (Gov. Br., p. 19), *Baer* v. *Moran Bros. Co.,* 153 U. S. 287, indicate that the term cannot properly include submerged lands. In the constitutions and statutes of California and Washington, the States where the *Walker* and *Baer* cases arose, "tide lands" has been used at least five times with the obvious intention of including submerged lands. *San Pedro R. R. Co.* v. *Hamilton,* 161 Cal. 610, 616, 119 Pac. 1073, 1074 (1911); *State ex rel. McKenzie* v. *Forrest,* 11 Wash. 227, 230-34, 37 Pac. 684, 685-86 (1895).

"Tide waters," of course, include all coastal waters. See, e. g., *Manchester* v. *Massachusetts,* 139 U. S. 240, 258 (1891).

one claiming under a Federal grant, and stated:

> "upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States."

This Court in that same case recognized the scope of the colonial charters we have described above, stating (152 U. S. at 14):

> "The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide water."

Numerous state cases pronounced the same doctrine of State succession to the rights of the Crown in land under navigable waters.[34]

The States continued to exercise various rights of ownership in the coastal waters, just as the Colonies had before the Revolution. Some examples of State action will be cited below in Point III.

C. The doctrine of State ownership of lands under all navigable waters, including coastal waters, is definitely established by repeated pronouncements of this Court.

It would be difficult to find any rule of law more clearly and uniformly settled than the rule which recognizes the

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[34] *Barker* v. *Bates*, 13 Pick. 255 (Mass. 1832); *Dunham* v. *Lamphere*, 3 Gray 268 (Mass. 1855); *Nichols* v. *Boston*, 98 Mass. 39, 42 (1867); *Gough* v. *Bell*, 21 N. J. L. 156, 160 (1847); *People* v. *Trinity Church*, 22 N. Y. 44 (1860); *Coxe* v. *State*, 144 N. Y. 396, 406 (1895); *Armour & Co.* v. *City of Newport*, 43 R. I. 211, 213, 110 Atl. 646 (1920); *Commonwealth* v. *Newport News*, 158 Va. 521, 541. 164 S. E. 689 (1932).

title of the individual States to all lands under navigable waters within their boundaries. This is derived from and consistent with the English common law rule, that the King's ownership of the beds of coastal waters extended inland as far as high-water mark. We have been unable to find a case which even expresses a doubt concerning the ownership of such submerged lands, whether within rivers, bays and harbors, or within coastal waters.

An example of a square holding on the States' ownership of land beneath coastal waters is *The Abby Dodge*, 223 U. S. 166 (1912).

In *The Abby Dodge*, this Court held that the Federal government cannot regulate sponge fishing in the Gulf of Mexico within the territorial waters of a State[35] and that an indictment for violation of a federal law prohibiting the use of diving apparatus in sponge fishing must negative the possibility that the offense occurred in State waters. It based this ruling (p. 174) on the principle that "each State owns the beds of all tide-waters within its jurisdiction" and quoted its formulation of that principle from *McCready* v. *Virginia*, 94 U. S. 391 (1876), discussed below.

The Government attempts to distinguish the *Abby Dodge* case on the ground that no contention was made that the United States owned the sponges within the three-mile belt (Br., p. 161).[36] The argument for the United States in that case, however, unsuccessfully advanced (223 U. S. at 170-71) the same contention respect-

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[35] The argument before this Court showed that the territorial waters of Florida, there in question, extended three leagues from shore, in the Gulf of Mexico (223 U. S. at 169).

[36] The Government contended there, in order to show that the sponges were taken outside territorial limits of the State, that the sponge beds in question were "from fifteen to sixty and sixty-five miles out" (223 U. S. at 177).

ing the international nature of the three-mile belt upon which the Government here relies. Since sponges grow attached to the bed of the ocean far beyond low-water mark, it is inconceivable that this Court would have held the Federal statute inapplicable to the taking of sponges, if the bed of the ocean belonged to the United States.

That the States retained their ownership within the three-mile limit is established also by this Court's decision in *Manchester* v. *Massachusetts,* 139 U. S. 240 (1891). A Massachusetts statute of December 28, 1859, had proclaimed that "The territorial limits of the Commonwealth extend one marine league from its seashore at low-water mark." Manchester was convicted in the State Court of illegal fishing within the State's territorial waters, but declared that the locus was on the high seas and therefore within the exclusive jurisdiction of the Federal Courts. The Supreme Court upheld the State Court. The Supreme Court said that:

> "*if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, would unquestionably be acknowledged by all foreign nations,* and her right to control the fisheries within those boundaries would be conceded. The limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, *have never been placed at less than a marine league from the coast on the open sea;* * * *" (139 U. S. at 257).
>
> "*The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation;* and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State * * * *Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea* * * *" (p. 264).

The Government now suggests that because the offense occurred in Buzzard's Bay, the *Manchester* opinion has no bearing on rights within the three-mile belt (Br., pp. 156-157). The important point dealt with by the Court in that case was not that the offense occurred in a bay, but that the illegal fishing for which Manchester was convicted occurred within the three-mile limit. The State's ownership of the bay was based upon its ownership of the lands within three miles of its shore. The Court said (139 U. S. at 258):

> "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are *within this limit* * * *."

In other words, the holding of State title within a bay of "two marine leagues in width at the mouth" is merely a means of applying the general principle of State ownership of submerged lands within a marine league of the coast. Its application to Buzzard's Bay therefore constitutes acceptance of the general principle, and does not represent any special rule designed only for bays and harbors.

The numerous statements by this Court of State ownership of coastal waters, which we shall now discuss, take added significance from the nature of the holdings in the two cases we have just analyzed.

The *McCready* case was not the first to announce the doctrine of state ownership of submerged lands. It was set forth in *Martin* v. *Waddell*, 16 Pet. (41 U. S.) 367 (1842), from which we have already quoted (*supra*, pp. 24-25).

Exactly the same language was used in the case of *Mumford* v. *Wardwell*, 6 Wall. (73 U. S.) 423 (1867),

as had previously been used in the case of *Martin* v. *Waddell.*

Continuing chronologically, in *Den* v. *The Jersey Co.,* 15 How. (56 U. S.) 426 (1853), the Court had under consideration land which was formerly under the tide waters of the Hudson River below low water mark. In that case the Court held that the decision in *Martin* v. *Waddell* governed and that:

> "the soil *under the public navigable waters* of East New Jersey belonged to the State" (15 How., at 432).

In *Smith* v. *State of Maryland,* 18 How. (59 U. S.) 71, 74 (1855), this Court held:

> "Whatever soil *below low water mark* is the subject of exclusive propriety and ownership, belongs to the state *on whose maritime border,* and within whose territory, *it lies,* subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence."

Plaintiff's present contention, that part of the land below low-water mark belongs to the Federal Government, is directly contrary to the statement above that "whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the State."

Again in *Weber* v. *Board of State Harbor Commissioners,* 18 Wall. (85 U. S.) 57, 65 (1873), this Court held:

> "By that law the title to the *shore of the sea,* and of the arms of the sea, and in the *soils under tide waters,* is, in England, in the King, and in this country, *in the state.*"

Here the Court refers to (1) shore of the sea, (2) arms of the sea and (3) soils under tidewaters. It is quite

evident that these phrases do not all mean the same thing. Thus the decision is not limited solely to the strip of land between high and low water; on the contrary the Court is stating a rule which applies to *all* lands beneath the waters of the sea or any part thereof within a state's boundaries.

The decisions on the subject are so numerous and so uniform in affirmance of the doctrine that Chief Justice White observed in 1876 in *McCready* v. *Virginia*, 94 U. S. 391, 394, that:

> "The principle has *long been settled* in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away."

In *Shively* v. *Bowlby*, 152 U. S. 1, 11 (1894), it is stated:

> "By the common law, both the title and the dominion of *the sea*, and of rivers *and arms of the sea*, where the tide ebbs and flows, and of *all the lands below high-water mark*, within the jurisdiction of the Crown of England, are in the King. * * *"

In its considered pronouncement of this doctrine it is quite evident that the Court has applied the same legal rule to those lands "where the tide ebbs and flows" and also to "all lands below the high-water mark", which necesarily includes the submerged lands lying below low-water mark and underlying the coastal waters. The Court went on to hold that the soils under navigable waters, including tide waters, "were not granted by the Constitution to the United States, but were reserved to the States respectively" (p. 36).

In *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 435 (1892), this Court likewise stated, with respect to lands under the waters of Lake Michigan:

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found. * * *"

The fact that the *Illinois Central* case related to one of the Great Lakes is by no means a distinguishing feature, in spite of plaintiff's attempt to classify the Great Lakes as inland waters (see Govt. Br., pp. 257 (Ohio grant) and 258 (Wisconsin grant)). The ownership of the bed by the State of Illinois was not based upon any doctrine peculiar to the Great Lakes, but was pronounced as an application of the doctrine of State ownership of lands under navigable waters. This Court said (146 U. S. at 435):

> "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of the dominion and sovereignty over lands covered by the fresh waters of these lakes."

The pertinence of cases and statutes relating to the Great Lakes is further emphasized by this Court's ruling that the Detroit River, connecting Lake Huron with Lake Michigan, is part of the "high seas." *United States* v. *Rodgers,* 150 U. S. 249, 256 (1893); *cf. The Genesee Chief,* 12 How. 443 (1851).

In *United States* v. *Mission Rock Company,* 189 U. S. 391, 404 (1903), this Court held, quoting from *Weber* v. *Commissioners, supra,* 18 Wall. at 65, that California was vested with the "absolute property in * * * all soils under the tide waters within her limits."

In *Louisiana* v. *Mississippi,* 202 U. S. 1, 52 (1906), this Court stated:

> "The maritime belt, that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States."

"Sway" is defined in Webster's New International Dictionary (1938 ed.) as meaning "sovereign power; dominion. * * *" This Court considered the gulfward boundary of Louisiana as having been fixed at a distance of three leagues from the coast upon her admission to the Union by the Acts of Congress providing therefor.

In *Port of Seattle* v. *Oregon and Washington Railroad Company,* 255 U. S. 56 (1921), this Court in an opinion by Mr. Justice Brandeis, stated (p. 63):

> "The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same."[37]

In *Massachusetts* v. *New York,* 271 U. S. 65 (1926), in dealing with a strip of land formerly submerged in Lake Ontario, this Court stated (p. 89):

> "It is a principle derived from the English common law and firmly established in this country that the

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[37] See pp. 48-49, *infra,* for the Pacific boundary of the State of Washington.

> title to the soil under *navigable waters* is in the sovereign, except so far as private rights in it have been acquired by express grant or prescription. *Shively* v. *Bowlby*, 152 U. S. 1. The rule is applied both to the territory of the United States (*Shively* v. *Bowlby, supra*) and to land within the confines of the States whether they are original States (*Johnson* v. *McIntosh, supra; Martin* v. *Waddell, supra*) or States admitted into the Union since the adoption of the Constitution. *United States* v. *Holt State Bank*, 270 U. S. 49."

A recent and decisive application of the doctrine was in *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10 (1935), where the Court held that a patent from the Federal Government of an island in Los Angeles Harbor did not give title below high-water mark. The City of Los Angeles claimed under a later grant from the California Legislature covering "tide lands and submerged lands." (p. 12). In an opinion by Chief Justice Hughes, the Court said (p. 15):

> "The controversy is limited by settled principles governing the title to tide lands. The soils under tide-waters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed."

In *Skiriotes* v. *Florida*, 313 U. S. 69 (1941), this Court affirmed a conviction for violation of a Florida statute prohibiting the use of certain fishing apparatus "at a point approximately two marine leagues from mean low tide on the West shore line of the State of Florida and within the territorial limits of the County of Pinellas." The Florida Court had held that the marine boundary of

a state might be fixed at a distance farther than one marine league from the shore. This Court stated:

> "It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State."

As we have already pointed out, this Court earlier had upheld the regulation by States of oyster culture (*McCready* v. *Virginia*, 94 U. S. 391), fishing (*Manchester* v. *Massachusetts*, 139 U. S. 240), and sponge fishing (*The Abby Dodge*, 223 U. S. 166), over the adjoining coastal waters. The States have this right to regulate fishing because they hold the proprietary of the soil (*Smith* v. *Maryland*, 18 How. (59 U. S.) 71).

These decisions affirm the States' ownership of submerged lands underlying coastal waters, for "the jurisdiction of a State is coextensive with its territory; coextensive with its legislative power" (*United States* v. *Rodgers*, 3 Wheat. (16 U. S.) 280, 286-87, *supra*, p. 7).

Thus we find that the Supreme Court in at least fifteen decisions from *Martin* v. *Waddell* to *Skiriotes* v. *Florida*, has repeated the rule of State ownership of the bed of navigable waters within State boundaries as above defined. Plaintiff would now have us believe that all these statements are only *dicta*, and erroneous *dicta*, which this Court should repudiate under the guise of a distinction between coastal waters and other navigable waters.

There is no valid distinction of the foregoing cases, and we have seen that many of them are square holdings.

The suggested distinction between lands under coastal waters and lands under navigable waters has no basis in

law. We have seen above (II A) that the common law recognized the King's ownership in coastal waters on the same basis as his ownership of the beds of navigable waters generally.

Angell on *Right of Property in Tide Waters, and in the Soil and Shores Thereof* (Boston, 1826), one of the first treatises on water rights published in this country, stated the rule clearly (p. xiii):

> "In the arms and inlets of the sea, and also in the sea itself, so far as the right of national dominion extends, the sovereign power not only exercises a right of jurisdiction, but also a *right of property or ownership.*" (Italics from original.)

Angell, whose work was familiar to the Supreme Court a century ago,[28] stated definitely that the King had been the proprietor of tide waters in this country (pp. 37-38), that the Atlantic colonies had the same rights therein which the King had had, and that they never relinquished this right to the Federal government (pp. 50-51).

In John Bassett Moore's Digest of International Law (House Doc. 551, 56th Congress, 2d Sess.), the author quoted (at Vol. I, p. 671) *as an authoritative statement of the law* the following portion of this Court's opinion in *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 437 (1892):

> "So also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, *but upon the fact that the waters are navigable*, tide waters and navigable waters, as already said, being used as synonymous terms in England."

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[28] See *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 557 (1837); *Smith* v. *Maryland*, 18 How. 71, 75 (1855).

Plaintiff's case is predicated upon the unsupported assumption that a different legal principle governs the question of title to submerged lands in coastal waters from that which admittedly determines title to lands underlying inland navigable waters. If this were true, it is inevitable that the Supreme Court, in the hundred years in which it has dealt with these problems, would have indicated some such distinction and would have placed some limitation upon the broad principle which it has so many times announced. On the contrary, the Court has been at pains to use language which states the broad rule that the States own all lands beneath their navigable waters, regardless of the location of the waters or whether they be salt or fresh. The fact that no such distinction has ever been recognized or even suggested heretofore, taken in consideration with the rationale underlying this general principle, is, we submit, conclusive of the proposition that ownership of land underlying both inland navigable waters and coastal waters is governed by the same legal principle.

For example, in *Martin* v. *Waddell*, 16 Pet. (41 U. S.) 367 (1842), the ownership of submerged lands in Raritan Bay was at issue, but the court made specific reference to "all navigable waters and the soil under them • • •" in upholding state ownership. (See pp. 24-25, *supra*.)

In the leading case of *Pollard* v. *Hagan*, 3 How. (44 U. S.) 212 (1845), lands under all navigable waters were emphasized in the decision, although the title to lands under water at the mouth of the Mobile River was specifically in contest.

The Court stated (p. 230):

> "The *shores of navigable waters*, and the *soils under them*, were not granted by the Constitution to the United States, but were reserved to the States respectively."

It is obvious from this language that the Court is deliberately laying down an all-inclusive rule which applies (1) to the shores of navigable waters and (2) to the soils under navigable waters. This phraseology necessarily includes all navigable waters within a state's territorial boundaries and shows all lands beneath such waters to be governed by the same rule. Careful analysis of the language used in the many other cases shows the same application of the basic principle to all navigable waters within the state's jurisdiction.

The rationale is clear. If the lands underlie navigable waters and are situated within the boundaries of a State, title to such lands is vested in the State. It was not fortuitous that the language used in the last mentioned cases, and many others, was broad. It was necessarily broad, because the principle applied was broad. The principle was never divided, for it was the one governing rule supporting State ownership and was vastly more important than title issues over divers segments of submerged lands. To state the rule was to adjudicate ownership in all cases.

The same principle which applies to submerged lands under coastal waters controls the ownership of lands beneath the Great Lakes (See *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387 (1892), p. 32, *supra; Massachusetts* v. *New York*, 271 U. S. 65 (1926), p. 33, *supra*).

The same principle is uniformly applied to lands under other navigable lakes,[39] and to the beds of navigable rivers.[40]

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[39] *United States* v. *Holt State Bank*, 270 U. S. 49 (1926); *State ex rel. Com'rs* v. *Capdeville*, 146 La. 94, 83 So. 421 (1919), cert. den. 252 U. S. 581 (1920); See also *United States* v. *Oregon*, 295 U. S. 1, 14 (1935); *Hardin* v. *Jordan*, 140 U. S. 371, 381-82 (1891).

[40] *County of St. Clair* v. *Lovingston*, 23 Wall. 46 (1874); *Barney* v. *Keokuk*, 94 U. S. 324 (1876); *Scott* v. *Lattig*, 227 U. S. 229, 243 (1913); *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 60 (1913); *United States* v. *Utah*, 283 U. S. 64 (1931).

The statements that we have quoted from Supreme Court cases affirming State ownership of submerged lands were not made without careful consideration or without reason. One poignant basis for the doctrine was set forth in *Pollard* v. *Hagan*, 3 How. (44 U. S.) 212, 230 (1845), as follows:

> "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers."

This reasoning is applicable to the beds of all "navigable waters," both inland and coastal.

To bolster its argument that the uniform and repeated pronouncements of this Court concerning State ownership of coastal waters are unsound, the Government cites (Br. pp. 47-48) *The Queen* v. *Keyn* [1876], L. R. 2 Exch. Div. 63, a case of extremely doubtful authority. It is strange that the government, which accuses this Court of dictum on the subject, should rely on dicta so patently unnecessary as those of Cockburn, C. J., in that case, where the only issue was the jurisdiction of admiralty court to try an offense committed by a foreign vessel exercising the privilege of navigation in British coastal waters. The decision was reached by a vote of seven to six, with such distinguished judges as Coleridge, C. J., and Lindley, J., declaring the three-mile belt to be part of English territory. The decision—as to admiralty jurisdiction—was promptly corrected by statute (41 & 42 Vict., c. 73). The dicta concerning ownership were inconsistent with earlier cases, such as *Benest* v. *Pipon*, 1 Knapp 60, 67, 12 Eng. Repr. 243 (1829), where the Privy Council had held that

the sea and the land beneath it are the property of the King.[41] In the later case of *Secretary of State for India* v. *Chelikani Rama Rao,* L. R. 43 Ind. App. 192, 199, 32 T. L. R. 652 (P. C. 1916), where the emergence of an island near Ceylon raised squarely the question of ownership of the ocean floor, the dicta in the *Keyn* case were criticized as contrary to the common law rule of Crown ownership, and the *Keyn* dicta were not followed.

Even if all the statements we have quoted from this Court's decisions were *dicta* (as the government would like to assume) they would still be controlling evidence of the American law, for

> "Reannouncement" of a "doctrine repeatedly over a period of more than 100 years serves to establish it, not only as the consistent view of the court, but also as a rule of property upon which practical transactions have been, and are being, based."
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> *United States* v. *Guaranty Trust Co.,* 33 F. (2d) 533, 537 (1929), aff'd, 280 U. S. 478 (1930).

In the face of the repeated and uniform recognition by this Court of State title to submerged lands underlying coastal waters, there is no justification for claiming that any different rule or rationale should be applied in the present action.

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[41] The Government is forced to confess (Br. p. 50) that the large majority of English cases have always favored the rule of the King's ownership of land under coastal waters. Even if this rule had been abandoned in the nineteenth century (which was not the case), it would not be material, for the common law as accepted in this country is the common law as it existed in England at the time of our separation from the mother country with only such modifications as have been made by our courts or legislatures. See *Shively* v. *Bowlby,* 152 U. S. 1, 14 (Govt. Br. p. 115); *Cathcart* v. *Robinson,* 5 Pet. 264, 280 (1831).

D. California and other States subsequently admitted entered the Union on an equality with the original States.

No distinction has been or can be drawn between the original thirteen States and those later admitted, with respect to the ownership of submerged lands.

Upon acquisition of the territory ceded by Mexico in 1848, the United States acquired title to lands underlying navigable waters, including tide lands,[42] but these submerged lands were held in trust for future States to be created out of such territory. Title to these lands passed to California at the time of her admission into the Union in 1850.[43]

California, like other States, entered the Union "upon equal footing with the original States, in all respects whatever,"[44] particularly with absolute property in and dominion over the beds underlying her navigable waters, *including those lands under coastal waters.* This Court has stated the reason for recognizing State ownership of such submerged lands (see p. 39, *supra*). No one can suppose that it was the thought of Congress to change the whole policy of the government and reserve to the nation the title and control of the soil beneath the navigable and

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[42] *Knight* v. *United States Land Association,* 142 U. S. 161, 183 (1891), citing cases.

The principles applicable to tide lands are applicable to lands underlying all navigable waters. *Shively* v. *Bowlby,* 152 U. S. 1 (1894). To California then belong her navigable waters and the soils under them. See *Pollard* v. *Hagan,* 3 How. (44 U. S.) 212, 229 (1845).

[43] *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10, 16 (1935); *Mumford* v. *Wardwell,* 6 Wall. 423 (1867).

[44] *Weber* v. *Board of State Harbor Commrs.,* 18 Wall. 57 (1873); *Pollard* v. *Hagan,* 3 How. 212 (1845); *Brewer Oil Co.* v. *United States,* 260 U. S. 77 (1922); *Scott* v. *Lattig,* 227 U. S. 229, 242 (1913).

tide waters,[45] including submerged lands underlying coastal waters.

This Court has stated that the sovereignty of California and the rights and powers dependent upon it are as complete as those of the original States (*United States* v. *Mission Rock Co.*, 189 U. S. 391, 404 (1903). Entering the Union "upon equal footing with the original States," California was entitled to define her boundaries in the sea, and did so with Congressional sanction.

By her Constitution, adopted in 1849, California defined her boundaries as running "to the Pacific Ocean and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific coast."[46] This Constitution was approved and ratified by the President and reported by him to the Congress, which referred to it in the Act of Admission adopted on September 9, 1850.[47]

The other States admitted after the original thirteen each had the same rights as California. From the earliest times, when the Congress began to create States out of the Northwest Territory given to the United States by certain of the original States, it provided that each one should be admitted "on equal footing with the original States,"[48] in all respects whatever.

In decisions relating to the submerged lands of other States, this Court as well as State Courts have frequently

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[45] Compare this Court's statement in *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284 (1894), in referring to the Act admitting the State of Washington.

[46] Article XII, Sec. 1, quoted in Apdx. to Answ., Part I, page 22.

[47] 9 Stat. 452; See Apdx. to Answ., pages 16-24.

[48] See Northwest Territory Ordinance, adopted by the Continental Congress on July 13, 1787, quoted in Apdx. to Answ., pp. 63-64.

referred to them as having been admitted "on an equal footing" with the original States.[49]

Were it not for the vigor with which the argument is pressed by the Government, it would seem idle to take any space to defend a doctrine which has been so frequently and so recently reiterated as the ownership of land beneath navigable waters under the "equal footing" rule. This doctrine was announced over a century ago in *Pollard* v. *Hagan*, 3 How. 212, 228-29 (1845), holding that Alabama must have the same right of ownership in the soils under navigable waters as the original thirteen States. Any rule which impaired the equality or uniformity of such ownership as among States would be unjustified and confusing. Chief Justice Stone again expressed the doctrine forcefully in 1935 in a case of original jurisdiction, *United States* v. *Oregon*, 295 U. S. 1, 14 (1935):

> "the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty".

To overcome such definite pronouncements, the Government again relies on fanciful distinctions, and asserts that navigable coastal waters are to be differentiated from navigable bays, harbors and inland waters and attributed to Federal rather than State sovereignty. We deny this assertion, which has no support in any decided case. State economy is just as much concerned with the regulation and development of the soils which underlie the adjoining coastal waters, whether for fishing, oyster culture or mineral development, as with the soils under other navigable waters.

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[49] See *Shively* v. *Bowlby*, 152 U. S. 1, 26 (1894); *Scott* v. *Lattig*, 227 U. S. 229, 242-43 (1913); *Oklahoma* v. *Texas*, 258 U. S. 574, 583 (1922); *United States* v. *Utah*, 283 U. S. 64, 75 (1931); *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 15 (1935); *Wilton* v. *Van Hessen*, 249 Ill. 182, 94 N. E. 134 (1911).

In reality, the Government's theory is extracted from a distortion of Mr. Justice Sutherland's reasoning on an entirely different point in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936), cited at pages 76-78 of the Government brief. The case had nothing whatever to do with the title to land or with any navigable waters. It involved the validity of a joint resolution of Congress which authorized the President to prohibit the sale of arms and munitions of war to the countries engaged in fighting in the Chaco, and punished violation as a crime. The resolution was attacked as constituting an illegal delegation of powers. The complete absence of any real support for the Federal Government's position in the present case is shown by their having to rely, on the question of title, on a case which has not the remotest connection with title questions.

We have already disposed of the argument that rights in coastal waters are different from other rights because they are vindicated by the national government (pp. 5-6, *supra*).

Nor is there any force in the argument that rights in coastal waters are the "creatures" of international law. It is significant that the first official pronouncements of this Government upon the rights in coastal waters, the 1793 opinions referred to in the Government Brief (pp. 128-132), were made with respect to an incident occurring in Chesapeake Bay. The Government concedes that this "historic bay" is to be treated as inland waters (Br., p. 18), and that it does not seek to overthrow State ownership of lands under inland waters (Br., p. 143), but the rule which recognizes title to bays is just as much (and just as little) a matter of international law as the rule of ownership in coastal waters. Again it is a rule of international law, that of the thalweg, which was the basis of decision in *Louisiana* v. *Mississippi*, 202 U. S. 1, 49 (1906); yet the Government seeks to distinguish that case as one involving inland waters (Br.,

p. 158). That same rule of international law fixes the boundary between New York and Ontario in the middle of the channel of the Niagara River; yet it is clear that the State of New York owns the bed of the river out to the international boundary (*International Paper Co.* v. *United States,* 282 U. S. 399, 404 (1931); *Matter of Niagara Falls Power Co.* v. *Water Power & Control Commission,* 267 N. Y. 265, 270, 196 N. E. 51 (1935), cert. den. 296 U. S. 609 (1935)).

None of the arguments advanced by the United States, therefore, constitutes any convincing reason for denying to any State any of the rights which the Original Thirteen States had in their coastal waters.

One right of the States was to fix their boundaries in the sea:

> "Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea".
>
> *Manchester* v. *Massachusetts,* 139 U. S. 240, 264 (1891).

Therefore each State which was admitted "on an equal footing" with the original thirteen acquired, first, the same ownership of submerged lands under its coastal waters as the original thirteen, and, second, the same right as the original thirteen States to define its boundaries on the sea within the limits fixed by the law of nations.

POINT III

The States' ownership of the bed of the sea out to the limit of their jurisdiction has been asserted, and acquiesced in by the Federal Government, for over 150 years, and is binding on the Federal Government.

A. State constitutions, statutes and decisions.

The answer originally filed by the State of California recites numerous examples of assertion by the States of

title to lands under navigable waters, including areas within the coastal waters. The list is necessarily incomplete, but it nevertheless constitutes an impressive record of statutes, decisions and grants, showing continued exercise of the same proprietary rights in coastal waters which the colonies had asserted before the Revolution. Plaintiff would now have this Court not only repudiate (under the guise of distinguishing) its previous decisions concerning the title of the States, but also brand the State decisions of the past century as incorrect and search for some non-proprietary theory to support the State statutes, despite the fact that both were in harmony with all the statements of this Court during the intervening years concerning State title to lands under coastal waters.

Exercise of ownership has taken many forms, and it is entirely fallacious for the Government to assert (Br., pp. 72, 77) that some of the original thirteen States never have claimed the marginal sea as being within their boundaries. On the contrary, all have claimed it, and no responsible person ever imagined that the Federal Government had any adverse claim thereto until shortly prior to the filing of the present suit.

A first category of State acts asserting title to lands under coastal waters is found in the provisions of statutes and constitutions fixing State boundaries so as to include islands or waters within a given distance from the coast.

Georgia, by Act of February, 1783, claimed all islands within twenty leagues of the coast (Georgia Dig. of Laws to 1800, pp. 258, 264; *id.*, p. 35, 1798 Const. Art. I § 23), and New Hampshire, in fixing its boundary "by the Sea", specifically included the Isle of Shoals (V. N. H. Laws (1784-92) 766, Act of June 16, 1791; Appdx. to Answ., p. 716).

Congress early recognized that coastal seas are parts of the States. In the Ohio Enabling Act of April 30, 1802 (2 Stat. 173), it declared that the northern boundary

of Ohio was in the water of Lakes Michigan and Erie (Apdx. to Answ., p. 724). The Louisiana Enabling Act passed by Congress in 1811 (2 Stat. 641), as well as the Louisiana Constitution of 1812 (Apdx. to Answ., p. 604), both include all islands within three leagues of the coast, while the similar Mississippi Enabling Act (3 Stat. 348) and Constitution of 1817 mention six leagues from shore (Apdx. to Answ., p. 611).[50] The Illinois Enabling Act of 1818 (3 Stat. 428) fixed the boundary of that new state as "the middle of Lake Michigan."[51]

Texas, when it became independent in 1836, nearly a decade before its annexation, established its boundary at three leagues from land (Apdx. to Answ., p. 58).

Further Federal approval of boundaries embracing coastal waters in the open sea is found in the case of California and Oregon, as well as some of the States admitted later.

The California Constitution of 1849 has already been mentioned (*supra*, p. 42), while Congress itself in the Act admitting Oregon (February 14, 1859), fixed the boundary as "Beginning one marine league at sea due west * * * from the line of the coast" (11 Stat. 383; Apdx. to Answ., p. 578).

Massachusetts later in that same year fixed its territorial limits as "one marine league from its seashore at extreme low-water mark" (Mass. Acts 1859, c. 289; Apdx. to Answ., p. 708). This Act merely confirmed an

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[50] See also Alabama Enabling Act (3 Stat. 489) and Constitution of 1819 (Apdx. to Answ., p. 616).

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ownership which had been asserted in various ways previously. Chief Justice Shaw had said, for instance, concerning the Massachusetts Charters from Charles I and James I that:

> "all the right, both to the soil under the sea, as far as by the law of nations one government is conceded to hold an exclusive right to the sea-coasts, and to the shores and arms of the sea, where the tide ebbs and flows, did vest in the grantees under those charters * * *."

Weston v. *Sampson*, 8 Cush. 347, 353 (Mass. 1851).

The eastern boundary of Florida was described in the State Constitution of 1868 (Art. I) as "along the edge of the Gulf Stream" and its gulf boundary as three marine leagues (nine nautical miles) from the shore (Appx. to Answ., pp. 627-28). This was the Constitution to which the Act of Congress had referred in conditioning the State of Florida to representation in Congress. Act of June 25, 1868, 15 Stat. 73. (See *Skiriotes* v. *Florida*, 313 U. S. 69, 70 [1941]; *Pope* v. *Blanton*, 10 F. Supp. 11 [N. D. Fla. 1934].)

Rhode Island described its boundary as "one marine league from its sea-shore, at high water mark" (R. I. Gen. Stats. 1872, c. 1, § 1). Similar statutes, using boundaries at three miles or more from shore, but generally measured from low-water mark, have been passed by other States.[20]

The President, under the Washington Enabling Act of 1889 (25 Stat. 676, 697), proclaimed the Constitution of

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[20] Ga. Act 610 of 1916, Appx. to Answ., p. 667; Maine Acts 1915, c. 330 ("to the extreme limit of the waters under the jurisdiction of this State"); Rev. Stat. 1930, c. 183, § 5, p. 1046; N. J. Act of May 17, 1916 (P. L., p. 362).

Washington (20 Stat. 1002), which described its boundary as in the Pacific Ocean "one marine league offshore." (Art. XXIV, § 1; Appx. to Answ., pp. 56-62).*

Washington by her constitution (Art. XVII, § 1; Appx. to Answ., p. 162), Florida by statute in 1915 (1915 Laws, C. 65, 66, 68; Appx. to Answ., p. 69), and Texas by statute in 1923 (1923 Rev. Civ. Stats., Art. 4042, Arts. 1655, p. 459) expressly declared their ownership of all submerged lands within their jurisdictions. (See also Va. Code (1887) §§ 1338, 1339).

A State's ownership of the bed of its coastal waters has not depend, however, upon express marking of a boundary by statute or otherwise. Its assertion by statute is merely the assertion of a pre-existing title, rather than being itself the source of title. This is illustrated by the fact that State jurisdiction had been exercised in many cases before the precise boundaries in the ocean had been expressly described.

A second category of State acts based on ownership of submerged lands under coastal waters is found in the statutes relating to the regulation or leasing of fisheries, oyster beds and other marine life or resources. Thus New Jersey early forbade non-residents to take clams or oysters in any of the rivers, bays or waters of the State (Act of December 31, 1829—Comp. Laws (1850) 1155), and Rhode Island had a similar regulation against taking shellfish within the waters or on the shores of the State (Dig. 1844, p. 335, § 6); see *State v. Medbury*, 3 R. I. 138—1855).

It has been impossible to assemble all the fishing laws of the States, but it is clear that control of fisheries in the open sea continued to be a matter of concern to the States. Manifestly granted to the upland owners the exclusive right to plant oysters in the waters of the bed of

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*Cf. *Lobitos v. Pollock*, 6 F. (2d) 337 (W. D. Wash. 1925) (holding no federal question presented by State protection of fishing within three-mile belt).

title to lands under navigable waters, including areas within the coastal waters. The list is necessarily incomplete, but it nevertheless constitutes an impressive record of statutes, decisions and grants, showing continued exercise of the same proprietary rights in coastal waters which the colonies had asserted before the Revolution. Plaintiff would now have this Court not only repudiate (under the guise of distinguishing) its previous decisions concerning the title of the States, but also brand the State decisions of the past century as incorrect and search for some non-proprietary theory to support the State statutes, despite the fact that both were in harmony with all the statements of this Court during the intervening years concerning State title to lands under coastal waters.

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[50] See also Alabama Enabling Act (3 Stat. 489) and Constitution of 1819 (Apdx. to Answ., p. 616).

[51] See also Act providing for admission of Michigan, June 15, 1836 (5 Stat. 49; Apdx. to Answ., p. 733) and Wisconsin Enabling Act of Aug. 6, 1846 (9 Stat. 56; Apdx. to Answ., p. 736); Pennsylvania's northern boundary extends into Lake Erie (5 Stat. 49, Act of June 15, 1836; Apdx. to Answ., p. 686).

ownership which had been asserted in various ways previously. Chief Justice Shaw had said, for instance, concerning the Massachusetts Charters from Charles I and James I that:

> "all the right, both to the soil under the sea, as far as by the law of nations one government is conceded to hold an exclusive right to the sea-coasts, and to the shores and arms of the sea, where the tide ebbs and flows, did vest in the grantees under those charters * * *."
>
> *Weston* v. *Sampson,* 8 Cush. 347, 353 (Mass. 1851).

The eastern boundary of Florida was described in the State Constitution of 1868 (Art. I) as "along the edge of the Gulf Stream" and its gulf boundary as three marine leagues (nine nautical miles) from the shore (Apdx. to Answ., pp. 627-28). This was the Constitution to which the Act of Congress had referred in readmitting the State of Florida to representation in Congress. Act of June 25, 1868, 15 Stat. 73. (See *Skiriotes* v. *Florida,* 313 U. S. 69, 70 [1941]; *Pope* v. *Blanton,* 10 F. Supp. 15 [N. D. Fla. 1934].)

Rhode Island described its boundary as "one marine league from its sea-shore, at high water mark" (R. I. Gen. Stats. 1872, c. I. § 1). Similar statutes, using boundaries at three miles or more from shore, but generally measured from low-water mark, have been passed by other States.[52]

The President, under the Washington Enabling Act of 1889 (25 Stat. 676, 697), proclaimed the Constitution of

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[52] Ga. Act 410 of 1916, Apdx. to Answ., p. 647; Maine Acts 1915, c. 330 ("to the extreme limit of the waters under the jurisdiction of this State"), Rev. Stat. 1930, c. 143, § 3, p. 1640; N. J. Act of May 17, 1906 (P. L., p. 542).

Washington (26 Stat. 1552), which described its boundary as in the Pacific Ocean "one marine league offshore" (Art. XXIV, § 1; Apdx. to Answ., pp. 541-42).[53]

Washington by her constitution (Art. XVII, § 1; Apdx. to Answ., p. 542), Florida by statute in 1913 (1913 Laws, C. 65, 32, §1; Apdx. to Answ., p. 628), and Texas by statute in 1925 (1936 Rev. Civ. Stats., Art 4026, Acts 1925, p. 438) expressly declared their ownership of all submerged lands within their jurisdictions. (See also Va. Code [1887] §§ 1338, 1339).

A State's ownership of the bed of its coastal waters does not depend, however, upon express marking of a boundary by statute or otherwise. Its assertion by statute is merely the assertion of a pre-existing title, rather than being itself the source of title. This is illustrated by the fact that State jurisdiction had been exercised in many cases before the precise boundaries in the ocean had been expressly described.

A second category of State acts based on ownership of submerged lands under coastal waters is found in the statutes relating to the regulation or leasing of fisheries, oyster beds and other marine life or resources. Thus New Jersey early forbade non-residents to take clams or oysters in any of the rivers, bays or waters of the State (Act of December 10, 1825—Comp. Laws (1833) 124), and Rhode Island had a similar regulation against taking shellfish within the waters or on the shores of this State (Dig. 1844, p. 533, § 6; see *State* v. *Medbury*, 3 R. I. 138—1855).

It has been impossible to assemble all the fishing laws of the States, but it is clear that control of fisheries in the open sea continued to be a matter of concern to the States. Mississippi granted to the upland owners the exclusive right to plant oysters in the waters of the Gulf of

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[53] *Cf. Lubetich* v. *Pollock*, 6 F. (2d) 237 (W. D. Wash. 1925) (holding no Federal question presented by State prosecution of fishing within three-mile belt).

Mexico in front of their lands (1886 Miss. Laws, p. 180; Apdx. to Answ., p. 614); Louisiana by a series of acts beginning in 1886[54] declared its title to all oyster beds underlying the navigable waters of the Gulf of Mexico within its territorial limits, and provided for leases thereof to individuals upon the payment of specified rentals to the State; Virginia claimed ownership of oyster-beds "whether the said bed * * * shall ebb bare or not" (Va. Code 1887, § 1338); Georgia gave to upland owners the exclusive rights to oysters and clams in the tide waters of the State, which were defined to include waters below low tide (1902 Ga. Laws, p. 108; Apdx. to Answ., pp. 648-49), but forbade the use of dredges within 1000 feet of ordinary mean tide (1905 Laws 73; Apdx. to Answ., p. 650); Rhode Island authorized State leases for oyster culture of land "covered by four feet of tidewater at mean low tide" (General Laws 1909, c. 203; Apdx. to Answ., p. 706); the New York Conservation Law fixed the marine district as including "all tidal waters within three nautical miles of the State coast" (L. 1912, c. 318); Oregon has authorized the State Land Board to lease land between low tide and three miles seaward therefrom for the harvesting of kelp and other seaweed (1917 Laws of Ore., c. 276, p. 516, Apdx. to Answ., p. 586); Texas has asserted its ownership of the bed of the Gulf of Mexico within its jurisdiction and vested the Game, Fish and Oyster Commission with control of fishing therein (Acts 1925, p. 438; Rev. Civ. Stat. [1936] Art. 4026); New Jersey has exercised jurisdiction over fishing in its Atlantic Waters (23 N. J. S. A. §§5-241, 5-24.2(e), 3-43); and Washington provided for leases of oyster beds lying below extreme low tide under navigable waters (Act 255 of 1927, Sec. 142, Apdx. to Answ., p. 557).

The long continuous nature of this jurisdiction is illustrated by New Jersey's current Shellfish Law, and espe-

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[54] Acts 106 of 1886, 121 of 1896 and 159 of 1900 (Apdx. to Answ., p. 604).

cially Chapter 4, "Regulations applicable to Atlantic Coast." The imposition of a seasonal restriction on oyster gathering (N. J. S. A. § 50:4-1) and the exclusion of non-residents (§ 50:4-2 and §§ 50:2-1, 50:2-2) go back to the colonial regulations of 1718 (I Nevill 86, *supra*, p. 18), while the restriction on the use of dredges, etc. (§ 50:4-2) goes back at least to the prohibition in the New Jersey Act of June 9, 1820, § II (1838 Digest N. J. Laws, p. 372).

In addition to the statutes cited above, there are numerous State decisions upholding State regulation of fisheries in the coastal waters. For instance, in *Bosarge* v. *State*, 23 Ala. App. 18, 121 So. 427 (1928), cert. den., 219 Ala. 154, 121 So. 428 (1929), cert. den., 280 U. S. 568, (1929), the Alabama Court, in reliance on this Court's holding in *Manchester* v. *Massachusetts* (139 U. S. 240, previously referred to at pp. 18, 28-29, 45, *supra*), held that an Alabama statute regulating the trolling for shrimp could be applied at a point within the Gulf of Mexico three-fourths of a mile beyond the beach of one of the outermost islands and that such point was within the "territorial jurisdiction" of the State of Alabama.

In the early case of *Dunham* v. *Lamphere*, 3 Gray 268 (Mass. 1855), Chief Justice Shaw sustained a Massachusetts statute forbidding the use of seines within one mile of the shores of Nantucket Island and Gravel Island.

In *Lipscomb* v. *Gialourakis*, 101 Fla. 1130, 133 So. 104 (1931), the Florida Court upheld a conviction for using diving apparatus to take commercial sponges from the Gulf of Mexico within the territorial limits of Florida.

Other State cases dealing with fishing regulations and other questions of ownership of submerged coastal lands are listed in the footnote.[55]

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[55] *Ocean Industries, Inc.* v. *Superior Court*, 200 Cal. 235, 252 Pac. 722 (1927) (enforcing regulation against sardine reduction plant on ship anchored off shore); *State* v. *Ruvido*, 137 Me. 102 (1940)

(*Continued on following page*)

A third category of State acts in the coastal sea relates to express grants of land under water or rights to extract products therefrom. An example of the exercise of such jurisdiction in coastal waters is a New Jersey statute entitled: "An act to authorize the owners of land upon tidewaters to build wharves in front of the same", which authorized "the owners of lands situated along and upon tidewaters to build docks or wharf on the shore in front of his lands beyond the limits of ordinary low water * * *" subject to license and to the preservation of public navigation (N. J. Laws 1851, p. 335).[56]

The right-of-way of the Florida East Coast Railway was largely on submerged lands granted by the State of Florida (Apdx. to Answ., pp. 641-45).

The New York Land Office, acting under long-standing statutory authority, gave a grant of land under water in 1897 extending 1500 feet from mean high water line into the Atlantic Ocean (see *People* v. *Steeplechase Park Co.*, 218 N. Y. 459, 113 N. E. 521—1916). The right to make

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(*Continued from preceding page*)

(fishing regulation within three-mile limit); *Burnham* v. *Webster*, 5 Mass. 266 (1809) (penalty for taking bass in the sea near mouth of river); *Dill* v. *Inhabitants of Wareham*, 7 Metc. (48 Mass.) 438 (1844) (King's ownership of fisheries passed to colonies); *Commonwealth* v. *Boston Terminal* Co., 185 Mass. 281, 282 (1904) (State has title to land within one league of shore); *State* v. *Stewart*, 184 Miss. 202, 184 So. 44 (1938) (removal of sand from bed of a tidal inlet); *Simpson* v. *Moorhead*, 65 N. J. Eq. 623 (1904) (holding that State owns tidal meadows below high water mark); *State* v. *Brown*, 3 Dutcher (27 N. J. L.) 13 (1858) (right to build wharf beyond low water mark); *State* v. *Kofines*, 33 R. I. 211 (1911) (license for lobster fishing); *Narragansett Real Estate Co.* v. *Mackenzie*, 34 R. I. 103 (1912) (holding that State has title to the bed of the Ocean); *State ex rel. Luketa* v. *Pollock*, 136 Wash. 25, 239 Pac. 8 (1925) (permitting enforcement of State fishing regulations within three-mile limit).

[56] *Cf. Freed* v. *Miami Beach Pier Corp.*, 93 Fla. 888, 112 So. 841 (1927) (right of littoral owner to build wharf on soil of marine belt, owned by State).

similar grants is one of the basic assumptions in New York's recent anti-erosion statute, permitting grants to municipalities of State owned land under water along the Atlantic Ocean, for the construction of jetties and other works to arrest erosion (N. Y. Laws 1945, c. 535).

Among other examples, Pennsylvania has authorized the Water and Power Resources Board to permit the dredging of sand and gravel from the bed of Lake Erie (Act of June 25, 1913; Apdx. to Answ., p. 687), and Ohio has authorized municipalities to lease land under water in Lake Erie for docks and wharves (Apdx. to Answ., p. 725).

Texas, beginning as early as 1913, authorized the Commissioners of the General Land Office to lease that portion of the Gulf of Mexico within its jurisdiction, for the production of oil and gas (1913 Texas Laws, p. 409; Apdx. to Answ., pp. 595-96). Act 30, Extra Session of the Legislature of Louisiana of 1915, and subsequent acts, authorized the execution of oil, gas and mineral leases covering State-owned lands, including submerged lands. (See also Apdx. to Answ., pp. 608-10.)

Grants of submerged lands in bays and harbors by the various States are too numerous to recite, but the States' ownership of such lands is based on the same principle as their ownership of lands under coastal waters. The Government recognizes the unity of the principle, and also that reliance on ownership of so-called inland waters has been of too great proportion to permit any suggestion of change (Br., p. 143).

Reference should also be made to the State cases dealing generally with the territorial limits of the States. A typical example is *Commonwealth* v. *Manchester*, 152 Mass. 230 (1890), wherein the Court upheld the statutory definition of the territorial limits of Massachusetts as extending "one marine league from its seashore at low-water mark." (Aff'd, 139 U. S. 240, *supra*, p. 28.)

In speaking for the Massachusetts Court, Field, *C. J.*, made the terse statement of the principle of law (p. 241):

> "There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States."

In all of the above cases the Courts based the powers of the States to regulate on the *ownership* by the States of the soils beneath their territorial waters.

These many State acts and decisions recognizing State title to submerged lands furnish strong additional reason for adhering to the rule, even apart from the decisions of this Court mentioned in Point II. As this Court said in *Best* v. *Polk,* 18 Wall. 112, 117 (1873), with respect to claims of title based on United States treaty with Indians:

> "* * * These decisions, furnishing a rule of property on this subject in Mississippi, were not brought to this court for review, as they could have been, but have been acquiesced in for a quarter of a century. To disturb them now would unsettle titles *bonâ fide* acquired."

B. Federal acceptance of grants from the States.

The repeated rulings and declarations of this Court sustaining and emphasizing the States' ownership of all lands under tidal waters within their boundaries have always been accepted and acted upon by the other branches of the Federal Government. The rule has thus been treated as a settled one. Whenever the Federal Government has required sites under coastal waters for defense or navigation, it has obtained them from the States by cession, by purchase, or by condemnation proceedings.

For instance, when the Federal Government built jetties in the Ocean, it has frequently obtained grants from the

States covering the land on which the jetties were built. Such grants were obtained in 1899 from South Carolina, covering a jetty extending 500 feet into the Atlantic Ocean (Apdx. to Answ., p. 653); from Florida in 1938, for a jetty at the mouth of the St. Johns River extending 2 miles into the Atlantic Ocean (Apdx. to Answ., p. 1931); and from Texas in 1912, for a strip extending 2 miles into the Gulf of Mexico from the City of Galveston (Apdx. to Answ., p. 592).[57]

Other grants of land under water, below low-water mark, are set forth in the Appendix to California's Answer. See, for instance, the Acts of Mississippi in 1858 (Apdx. to Answ., p. 612); Delaware in 1871, 1873 and 1899 (Apdx. to Answ., pp. 681-84); South Carolina in 1896 and 1900 (pp. 654 to 656); Washington in 1909 (pp. 543-44); Virginia in 1922 (p. 667); and Florida in 1939 (Apdx. to Answ., p. 639). The foregoing list does not include the more numerous grants in bays and harbors, such as Alabama's 1919 grant of 12 acres of submerged land in Mobile Bay (Apdx. to Answ., pp. 618-19), although we have seen that the same rule sustains State title to submerged lands in bays as applies in coastal waters.

Special mention should be made of lighthouse sites, for the Federal Government has always recognized that these must be obtained from the States. The Federal statute provides (33 U. S. C. A., § 727):

> "No lighthouse, beacon, public piers, or landmark, shall be built or erected on any site until cession of jurisdiction over the same has been made to the United States."

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[57] In the absence of such a grant, the jetty remains within State jurisdiction. *Winston Bros. Co.* v. *Galloway*, 168 Ore. 109, 121 P. (2d) 457 (1940) (sustaining State tax on profits from work done on jetty beyond low-water mark).

The States and the United States have acted on the principle set forth in this statute, that deeds from a State are necessary for lighthouse sites, whether they be above or below low-water mark. The Legislature of Maine in 1887 made a grant of lands under water in Quoddy Roads (Apdx. to Answ., p. 719); New York in 1874 ceded jurisdiction over a number of sites in New York Harbor and Long Island Sound (Apdx. to Answ., pp. 692-96); and general statutes have been enacted by Alabama in 1875 (Apdx. to Answ., pp. 617-18), Maryland in 1874 (Apdx. to Answ., pp. 671-72), Massachusetts in 1880 (Apdx. to Answ., pp. 709-10), Michigan in 1874 (Apdx. to Answ., p. 734), Ohio in 1875 (Apdx. to Answ., p. 726), South Carolina in 1874 (Apdx. to Answ., p. 658), and Virginia in 1874 and later (Apdx. to Answ., pp. 664-65).

Similarly, grants have been obtained covering lands under water required by the Federal Government for forts.[58]

The Government attempts to belittle these grants by eliminating all those in harbors or bays, eliminating the Great Lakes as inland waters and then finding some excuse for each of those which it admits covered coastal waters. We have shown earlier in this brief (Point II C, *supra*) that bays and the Great Lakes are all subject to the same rules as coastal waters. Even apart from that, the fact remains that the United States has repeatedly accepted State deeds, made upon the assumption that the State held title to land under coastal waters, and that the Government has been unable to point to a single claim of Federal ownership prior to Mr. Ickes' reversal of his own earlier position in 1937.

The Federal Government, through its various agencies, has recognized the State ownership of these submerged

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[58] South Carolina Act of 1896 (Apdx. to Answ., pp. 654-55); California statutes of 1897 and later (Apdx. to Answ., pp. 91 to 116).

lands, not simply by requesting and accepting deeds from the States, but by other affirmative rulings.

The Attorney General has been required to pass on the validity of the title of the State in each instance where a deed was received (R. S. § 355; 40 U. S. C. A. § 255). An illustration is the opinion of the Attorney General of the United States affirming Washington's title to tide-lands and waters in the Pacific Ocean, surrounding the Fort Canby Military Reservation, rendered March 20, 1925 (34 Op. A. G. 428; Apdx. to Answ., pp. 545-46).

The Commissioner of the United States General Land Office, in 1910, in rejecting an application for submerged lands east of Key West, Florida, ruled that title thereto belonged to the State by its right of sovereignty (Apdx. to Answ., p. 637). Other rulings relating to submerged lands in Washington (13 L. D. 299, Apdx. to Answ., p. 565) and Texas (Navy Dept. Report of 1917, Apdx. to Answ., pp. 596-602) and lands in Lake Ontario within the State of New York (7 Op. A. G. 314; Apdx. to Answ., p. 699) and in Lake Michigan within the State of Illinois (8 Op. A. G. 172; Apdx. to Answ., p. 728) and within the State of Wisconsin (House Doc. 804, 66th Cong., 2d Sess.; Apdx. to Answ., p. 737), likewise recognize State title thereto.[59]

C. The Federal policy not to deprive the States of their submerged lands.

The policy of Congress in administering the area acquired by the United States from which subsequent States were formed also shows undeviating acquiescence in the

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[59] A similar principle is applied in Alaska, where submerged lands in the Behring Sea were deemed reserved from grant, to be left to the disposition of the new State when organized (29 L. D. 395, Apdx. to Answ., pp. 531, 534).

principle of State ownership of the beds of all navigable waters including coastal waters. No grants of land under navigable waters were to be made that would rob the State of this feature of State sovereignty.[60]

Similarly, where the United States has reserved public lands when admitting a new State to the Union, it has uniformly been held that lands under navigable waters are not part of the public lands so reserved. As this Court stated in *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284 (1894):

> "No one can for a moment suppose that it was the thought of Congress to change the whole policy of the government and reserve to the nation the title and control of the soil beneath the tide waters and those of navigable streams."[61]

In the present case, there is no suggestion that Congress has sanctioned any such far-reaching change as the United States Attorney General now seeks in respect to ownership of submerged lands. On the contrary, both houses of Congress have by positive action expressed their belief that the coastal waters and the lands under them rightfully belong to the States and have belonged to them since the Declaration of Independence (H. J. Res. 225, 79th Congress, 2d Session; see Senate Report No. 1260). The President's refusal to sign the bill was not based on the merits, but in recognition of the existence of this litigation.

There has therefore been no legislative revocation of the policy of continued acquiescence in the age-old State title,

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[60] *Barney* v. *Keokuk*, 94 U. S. 324, 338 (1876); *Shively* v. *Bowlby*, 152 U. S. 1, 49-50 (1894); *Donnelly* v. *United States*, 228 U. S. 243, 262 (1913); *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926).

[61] See also, *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10 (1935); *United States* v. *Oregon*, 295 U. S. 1, 14 (1935); *Pollard* v. *Hagan*, 3 How. (44 U. S.) 212 (1845).

as was true in instances mentioned by the Government relating to private titles (Govt. Br., pp. 212-14).

This history of recognition by the Federal Government of State title to submerged lands adds to the binding force of the rule we have set forth, for the United States, the same as a natural person, is bound by its acquiescence in territorial claims.

> *Missouri* v. *Iowa,* 7 How. 660, 670-73 (1849);
> *New Mexico* v. *Colorado,* 267 U. S. 30, 40-41 (1925);
> *Michigan* v. *Wisconsin,* 270 U. S. 295, 308 (1926).

Or to put it in another way—ever since the Constitution was adopted the legislatures and officials of the States and the United States have acted on the theory that the States, under the Constitution, own the soil of coastal waters. This uniformity in practice, continuing for 160 years, is a "construction of the most forcible nature" (*Stuart* v. *Laird,* 1 Cranch 299, 309 (1803); *Rogers* v. *Goodwin,* 2 Mass. 475, 477 (1807); *McKeen* v. *Delancy's Lessee,* 5 Cranch 22, 23-3 (1809); *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. at 322-29). A practical construction establishing a rule of property could not be successfully challenged at this late date, even if no judicial rulings on the point had ever been made.

The Government has attempted to do a lot of explaining in its brief. It explains away the admitted general assertions of ownership of lands beneath coastal waters, both in the eighteenth century and today, by assuming a gap at the time of the Revolution, during which the States did not make the claim; we have seen that this is a false assumption. It explains away twenty or more decisions of this Court. It brushes aside Vattel as reflecting only his own opinion. It explains away Jefferson's note of 1793. It explains away a dozen or more grants of land under coastal waters accepted from the States. It explains away Congress' fixing of State boundaries

three miles from shore. And it does not hesitate to call this Court unsound in long lines of decisions. One may say with the Queen in Hamlet, "The lady doth protest too much, methinks" (Act III, Sc. 2, l. 242).

The only true explanation of this litigation is that the Government, having found that portions of the coastal waters are valuable (Govt. Brief, p. 144), covets what is not its own, and seeks to repudiate a century and more of history in order to obtain that value without paying for it.

POINT IV

The doctrine of State ownership of lands under coastal waters is an established rule of property, which this Court should not disturb.

Plaintiff's demand for judgment in this action implies that the doctrine upon which the people of the United States and the several States have relied for a great number of years is incorrect and unfounded. A doctrine established as a rule of property since before the creation of the separate States, like that of State ownership of submerged lands, should not be overthrown. *The Lottawanna,* 21 Wall. (88 U. S.) 558 (1874); *Goodtitle* v. *Kibbe,* 9 How. (50 U. S.) 471 (1850). A consideration of some of the problems which would be raised by judicial repudiation of that doctrine emphasizes the wisdom of applying the rule just mentioned.

Recognition of Plaintiff's claim would not be a mere matter of upsetting one line of former jurisprudence to adopt and accept another, but this Honorable Court would be called upon to re-examine the whole range and scope of submerged land ownership, step by step and in fragmentary succession, over a long and indeterminate number of years.

Numberless miles of coastline would have to be contested separately. Any rule approaching uniformity would necessarily face numerous exceptions and qualifications which the several agreements of cession with former sovereigns, and different acts admitting the several States into the Union, would produce. Not only distinctions between States, but the need for detailed definitions of "inland waters," and questions as to the limits of State police power, would create uncertainties affecting many titles and the conduct of important industries.

A number of specific questions occur to us as we consider the status of jurisprudence, if the property rule of State ownership were to be unsettled by a decision for the plaintiff.

If the Federal Government owns part of the submerged lands within the coastal waters of a State, where do the lands start in their seaward extension? Do they begin at the present low-water mark, or where that mark was when a littoral State was admitted into the Union? Who would own natural accretions? Of equal importance, who would own the many square miles of coastal lands which have become submerged after coastal States were admitted into the Union? We must not be unmindful of the fact that one or more States have undergone substantial recessions of their coastlines since they were admitted to Statehood.

The diversity of coastlines, with respect to indentations, would also present a problem. Definitions of such water bodies as bays, harbors, sounds and straits would have to be made by the Courts in an approach to some uniformity of the title issues between the United States and the several States. The application of the headland-to-headland rule referred to in *Manchester* v. *Massachusetts,* 139 U. S. 240, 257 (1891), *supra,* p. 29, is by no means a simple problem. The Government's own brief shows some of these uncertainties. It refers with apparent approval

to proposals which would treat a bay ten miles or more in width at its entrance as inland waters (Br. p. 18n.), although this Court in the *Manchester* case gave "two marine leagues in width at the mouth" as the standard. In its analysis of the Answer it is unable to say with certainty whether Santa Monica Bay (Br., p. 231) and Massachusetts Bay (Br., p. 254) are to be treated as inland waters or open sea.

Quite evidently acceptance of the Government's thesis would require this Court to determine under the individual facts, the status of almost every wharf, roadstead, breakwater, cove, inlet, bayou or indentation on the entire coast, to ascertain whether it belonged to the State or the nation.

An additional class of problems which would arise from a holding of Federal title to submerged coastal lands relate to the commercial fishing industry. This industry, one of the earliest and still an important branch of the economy, has been built up under State regulation, sustained on the basis of State ownership of the sub-soil. Denial of that ownership would put in jeopardy the States' present power to retain for their own citizens the produce of the sea, and would cloud the basis for existing fishery regulations.

Recognition by the plaintiff that success in this suit may lead to attempts at further inroads on State ownership and control of submerged lands is found in the language of the Statement in Support of Motion, that

> "this case is sharply to be distinguished from those decisions *which are thought to hold* that the State has property interests in bays, harbors, rivers and other inland waters as well as the so-called tidelands" (p. 3).

The crowning evidence of the error in the Government's position is the fact that it is twice forced to admit

(Br., pp. 14, 144) that, if it persuades this Court to accept its views, it will then have to go to Congress to correct the inequity of the situation which will have been created. Observance of the general rule of respecting previous decisions on real property law will avoid the creation of any such inequity.

Conclusion

We respectfully urge that the assertion of title by the colonies and States, subsequent Congressional approval and long recognition of title in the littoral States by the Federal Government preclude the assertion of title by the Federal Government before this Court.

We also submit that the issue has been previously adjudicated by this Court; that this Court's long standing decisions and the uniform course of conduct by the executive and legislative departments of the Federal and State Governments have resulted in an established and long settled rule of property law—the ownership by the State of California and other States of their navigable waters, including submerged lands underlying coastal waters.

The complaint should be dismissed.

Respectfully submitted,

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL.

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